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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CROSSFIT, INC., a Delaware
12 corporation,

13 Plaintiff,

14 v.

15 NATIONAL STRENGTH AND
16 CONDITIONING ASSOCIATION, a
Colorado corporation,

17 Defendant.
18

Case No.: 14-CV-1191 JLS (KSC)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF
CROSSFIT, INC.'S RENEWED
MOTION FOR TERMINATING
SANCTIONS**

(ECF Nos. 326, 359)

19 Presently before the Court is Plaintiff CrossFit, Inc.'s Renewed Motion for
20 Terminating Sanctions ("Mot.," ECF Nos. 326, 359), as well as Defendant the National
21 Strength and Conditioning Association's ("NSCA") Opposition to ("Opp'n," ECF No.
22 353) and CrossFit's Reply in Support of ("Reply," ECF No. 369) the Motion. Also before
23 the Court are the Final Report of Execution Against Agreed Upon Forensic Protocol ("Final
24 Rep.," ECF No. 322) and Supplemental Status Report of Execution Against Agreed Upon
25 Forensic Protocol ("Supp. Rep.," ECF No. 379-2), both prepared by the Court-appointed
26 neutral forensic evaluator, Stroz Friedberg ("Stroz"), and the Parties' voluminous
27 declarations and exhibits. *See* ECF Nos. 327–37, 346, 353, 358, 360–68, 370–75. The
28 Court held a hearing attended by the Parties and Stroz on October 22, 2019. *See* ECF Nos.

387, 388 (“Tr.”). Having carefully considered the Parties’ arguments, the evidence, and the law, the Court **GRANTS IN PART** and **DENIES IN PART** CrossFit’s Motion, as follows.

BACKGROUND

The factual and procedural background through October 2018, are thoroughly documented in the Court’s May 26, 2017 Order Granting in Part and Denying in Part Motion for Sanctions (ECF No. 176) and October 19, 2018 Order (1) Denying Defendant’s Motion to Appoint Special Master, and (2) Setting Scheduling Order (ECF No. 302). *See* ECF No. 176 at 2–6; ECF No. 302 at 2–22. The Court incorporates by reference the facts as presented fully in those Orders and sets forth below factual and procedural developments since October 2018.

I. Discovery from the Kraemers

On November 28, 2018, a digital forensics vendor selected by The Ohio State University (“OSU”), TCDI, collected data from Dr. William Kraemer’s and Joan Kraemer’s mobile devices. Final Rep. at 9. Although OSU authorized TCDI to turn over to Stroz the data from Ms. Kraemer’s mobile device, Stroz has not received the data from Dr. Kraemer’s mobile devices. *Id.*

On the same day that TCDI harvested data from the Kraemers’ mobile devices, Stroz conducted informational interviews of Dr. and Ms. Kraemer “regarding their device and[]account usage, and preservation efforts related to NSCA business.” *Id.* Dr. Kraemer informed Stroz that he had used an iPhone purchased by the NSCA between approximately 2016 and January 2018, and that he had purchased his current mobile device in January 2018. *Id.* at 10. In January 2018, with the help of OSU staff, Dr. Kraemer transferred data from his NSCA-owned iPhone to his new device. *Id.* With the assistance of OSU staff, Dr. Kraemer then performed a factory reset of his NSCA-owned iPhone, although he did not return the device to the NSCA. *Id.* Dr. Kramer also reset to factory defaults the four previous mobile phones he had used for NSCA business, three of which he returned to the NSCA and one of which was lost in 2010. *Id.*

1 During the pendency of this litigation, Dr. Kraemer has had three separate laptops:
2 one at the University of Connecticut (“UConn”) and two successive ones at OSU. *Id.* OSU
3 technicians transferred data from Dr. Kraemer’s UConn laptop to his first OSU laptop and
4 from Dr. Kraemer’s first OSU laptop to his second. *Id.*

5 Ms. Kramer has been using her current iPhone, which was purchased by the NSCA,
6 since approximately five years ago. *Id.* Prior to that, she had used a flip phone purchased
7 by the NSCA. *Id.* Ms. Kramer “wiped” the flip phone before returning it to the NSCA.
8 *Id.*

9 On December 11, 2018, CrossFit re-deposed Dr. Kraemer. *See generally* Decl. of
10 Justin S. Nahama in Support of Mot. (“Nahama Decl.,” ECF No. 327) Ex. 76, ECF No.
11 327-76.

12 **II. Review of NSCA Asset Inventory**

13 Although Stroz believed it had collected everything through its device-based
14 collection efforts, *see* Tr. at 45:6–13, 48:13–16, on December 6, 2018, counsel for CrossFit
15 provided to Stroz several asset inventories that the NSCA had produced.¹ Final Rep. at 11.
16 The asset inventories listed 538 records, some of which Stroz determined to be duplicates.
17 *Id.* Stroz confirmed that it had imaged or otherwise collected data from devices listed in
18 225 of the 538 records. *Id.*

19 On January 14, 2019, counsel for the NSCA confirmed to Stroz that 225 devices had
20 been provided to Stroz and that an additional 17 devices had “[p]ossibly” been provided to
21 Stroz. *Id.* at 12; *see also* ECF No. 319-3. Counsel for the NSCA was “[u]nable to
22 determine” whether devices in 240 of the listed records had been provided to Stroz. Final
23 Rep. at 12; *see also* ECF No. 319-3.

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26 ¹ At the October 22, 2019 hearing, it became clear that these asset inventory logs were actually produced
27 in the State Court Action, *National Strength and Conditioning Association v. Glassman et al.*, No. 37-
28 2016-00014339-CU-DF-CTL (Cal. Super. filed May 2, 2016), and were only produced to CrossFit—and
provided to Stroz—in the final months before the completion of Stroz’s forensic evaluation. *See* Tr. at
20:6–19, 45:6–46:3, 48:7–24, 60:7–25.

1 On August 1, 2019, counsel to the NSCA submitted an updated asset inventory in
2 support of its Opposition that claims to have located over 150 of the devices the NSCA
3 previously had been unable to locate. *See* Decl. of Genevieve M. Ruch in Support of the
4 Opp’n (“Ruch Decl.,” ECF No. 353-2) ¶ 3; *see also* Ruch Decl. Ex. 1, ECF No. 353-4.

5 **III. Review and Production of Documents**

6 **A. Documents from the NSCA**

7 After running the Parties’ search terms on the 12 Terabytes of data harvested from
8 the NSCA,² Stroz ported to a Relativity document review workspace 1,245,070
9 presumptively relevant documents, consisting of 853,699 direct search term hits plus
10 family members.³ Final Rep. at 14; *see also* Final Rep. App. F. The NSCA began its
11 review of these documents on November 6, 2018. Final Rep. at 15.

12 Between November 20, 2018, and January 2, 2019, Stroz produced 218,949
13 documents to CrossFit. *See id.* After January 2, 2019 and prior to the filing of its Final
14 Report on April 4, 2019, Stroz produced an additional 60,605 documents to CrossFit. *See*
15 *id.* All told, 279,554 documents were produced to CrossFit as a result of the neutral
16 forensic evaluation prior to the filing of Stroz’s Final Report. *Id.* The NSCA also provided
17 privilege and non-responsive logs to CrossFit containing 43,448 and 932,422 entries,
18 respectively. Ruch Decl. ¶ 10.

21 ² Although the Parties initially agreed to a protocol that provided for collection of data from a list of
22 relevant custodians, *see* Final Rep. at 4, the “NSCA was unable to determine actual relevant custodians
23 and instead identified an extensive list of ‘potential’ custodians.” *Id.* at 8. “In addition, NSCA asset
24 inventory records were inaccurate or incomplete.” *Id.* “As such, Stroz recommended, and the Parties
agreed to, broadened the collection strategy under the Protocol to collect *every* NSCA-owned computer,
mobile device, server, and external storage device, regardless of its primary user.” *Id.*

25 ³ Because the “NSCA was unable to verify that the listed keywords [in Appendix B of the September 2017
26 Protocol], or even which keywords, were used to produce responsive documents in the proceedings . . . ,
27 on April 27, 2018, Stroz and the Parties came to decide on a process for the Parties to propose a reach
28 agreement on a set of keywords to be applied against the differential data set.” Final Rep. at 14; *see also*
Final Rep. App. D; Tr. at 41:14–21 (“The reason [Stroz] ended up collecting everything wasn’t the
generosity of a party. It was because of poor record-keeping[and] . . . inability to give [Stroz] what [it]
needed to feel confident that what [it] w[as] collecting was actually the universe.”).

1 Since April 4, 2019, the NSCA has produced an additional 153 documents in
2 response to CrossFit’s challenges to the NSCA’s non-responsive and privilege logs, 81
3 documents related to a newly agreed-upon search for documents, and one additional
4 document that had previously been produced. *Id.* ¶ 11. CrossFit has continued to challenge
5 the NSCA’s claims of non-responsiveness, privilege, and confidentiality. *Id.* ¶ 15.

6 ***B. Documents from the Editorial Manager System***

7 On January 7, 2019, Stroz received data from the Editorial Manager System, which
8 holds the NSCA’s publications and historical data associated with those publications, from
9 the owner of the software, Areis Systems. *See* Final Rep. at 8–9. The data harvested from
10 the Editorial Manager System yielded 93,627 presumptively relevant documents,
11 consisting of 93,586 direct search term hits plus Manuscript Group members. *Id.* at 14;
12 *see also* Final Rep. App. G. Stroz made these documents available for the NSCA to review
13 in Relativity on March 14, 2019. Final Rep. at 14. The NSCA produced 8,645 documents
14 from Editorial Manager following the filing of Stroz’s Final Report. Ruch Decl. ¶ 11.

15 **IV. Stroz’s Final and Supplemental Reports**

16 On April 4, 2019, CrossFit filed Stroz’s Final Report, *see* ECF No. 319, which was
17 provided to the Parties on April 3, 2019. *See* ECF No. 319-4. In addition to relaying many
18 of the above developments, Stroz relayed its conclusions from its forensic analysis. *See*
19 Final Rep. at 12–13.

20 Specifically, “Stroz performed forensic analysis to identify devices that may reflect
21 evidence of spoliation through unreasonable wiping or deletion across all collected devices
22 and repositories.”⁴ *Id.* at 12. Although “Stroz identified no evidence of data wiping on
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24 ⁴ At the hearing, in response to arguments from the NSCA that “Stroz did not describe an in-depth forensic
25 analysis,” *see* Tr. at 32:14–15, Stroz clarified that it “conducted [an] in-depth forensic analysis . . . using
26 forensic industry standard tools.” Tr. at 40:18–19; *see also id.* at 41:23–24 (“[Stroz] did in-depth forensics
27 on a number of items of media.”), 43:4–7 (noting that Stroz conducted “deep forensics . . . on a number
28 of items of media that resulted in the identification of a hundred-and-some-odd documents that are
presumptively relevant based on the parties’ agreement.”). Stroz also clarified that “when [a forensic
evaluator] look[s] for evidence of wiping, [it is] looking for the installation of a tool or an application or
a technology that [a spoliator] can use to render data unrecoverable,” *id.* at 75:21–23, whereas “mass

1 any of the collected devices” and “no evidence of deletion of the Exhibit A Documents,”⁵
2 *id.* at 12–13, “Potentially Relevant Documents and mass deletions were identified across
3 some devices.”⁶ *Id.* at 13; *see also* Final Rep. App. E.

4 “Based on the deletion findings, Stroz performed more in-depth analysis of each of
5 the devices to determine potential context for deletions or other related user activity.” Final
6 Rep. at 13. “While deletion evidence may be related to moving documents to another
7 device or volume, the fact that recoverable and processed data was excluded from [Stroz’s]
8 analysis negates this possibility.” *Id.*; *see also* Tr. at 40:25–41:3.

9 Stroz identified several mass deletion events occurring throughout the pendency of
10 this litigation. *See* Final Rep. at 13; *see also* Final Rep. App. E. Overall, Stroz found
11 evidence of 9,107 documents destroyed in seven separate mass deletion events. *See* Final
12 Rep. at 13; *see also* Final Rep. App. E. These mass deletion events also resulted in the
13 destruction of 50 presumptively relevant documents. *Id.* Another 67 presumptively
14 relevant documents were destroyed in non-mass deletions. *Id.*

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17 deletion is . . . when [an evaluator] look[s] forensically at a drive, sometimes [it] see[s] spikes in activity
18 that [it] can further investigate using forensic techniques to try to figure out what caused that spike,
whether it was intentional or not.” *Id.* at 75:24–76:3.

19 ⁵ Exhibit A to CrossFit’s original motion for sanctions was a “[s]preadsheet drafted by Torrey Smith[, the
20 NSCA’s certification director,] containing his notes on documents responsive to CrossFit’s discovery
21 requests.” *See* ECF No. 150-2. Mr. Smith noted that “‘CrossFit’ Appeared in the **2012** Job Analysis
22 Survey for the CSCS and the NSCA-CPT certifications in a list of credentials under the question ‘Which
23 certifications and/or licenses do you current[ly] maintain? THIS IS THE JOB ANALYSIS REPORT
24 INFORMATION THAT THE NSCA CERTIFICATIONS ARE BUILT FROM (CORE BUSINESS)
25 AND IS CONFIDENTIAL AND PROPRI[E]T[A]RY INFORMATION THAT IS CRITICAL TO THE
26 SUCCESS OF OUR CERTIFICATION PROGRAM – THIS REPORT AND FULL INFORMATION
27 SHOULD NOT BE SHARED WITH ANYONE.’” ECF No. 150-3 Ex. A (emphasis in original). In its
28 May 26, 2017 Order, the Court ordered CrossFit to provide “a copy of this Order to the neutral forensic
analyst so that she may search for other instances of the document referenced in Exhibit A—or its
deletion—and any surrounding context.” ECF No. 176 at 11.

⁶ Although Stroz was able to recover the filenames of the documents appearing in Appendix E to Stroz’s
Final Report, it was unable to recover the contents of those documents. *See* Final Rep. at 13 n.9.
Accordingly, a document was considered presumptively relevant if the filename contained one of the key
terms to which the Parties agreed. *See id.*

1 Following the filing of Stroz’s Final Report, CrossFit renewed its request for
2 terminating sanctions on June 20, 2019. *See generally* ECF No. 326. On August 29, 2019,
3 after the close of briefing on the instant Motion, CrossFit filed Stroz’s Supplemental
4 Report, *see* ECF No. 379, which was provided to the Parties on August 28, 2019. *See* ECF
5 No. 379-3. The Supplemental Report was meant “to help clarify several points raised by
6 the parties regarding [Stroz’s] work performed to date.” Supp. Rep. at 1.

7 In its Supplemental Report, Stroz emphasized that, “[w]hile Stroz did not identify
8 evidence of deletion of the documents referenced in Exhibit A of Plaintiff’s Sanction
9 Motion or of the use/installation of wiping utilities, Stroz did identify evidence of mass
10 deletions and deletion of files whose names were responsive to agreed-upon keywords
11 across numerous NSCA devices.” *Id.* (citing Final Rep. at 12–13; Final Rep. App. E).
12 Stroz clarified that “the Protocol did not require Stroz to conduct an in-depth deletion
13 analysis of the data harvested from NSCA devices and processed into Relativity. Rather,
14 Stroz agreed to make available to the Parties (in accordance with agreed upon production
15 protocols) all available data, including recoverable deleted files, for the Parties’ own
16 review and analysis.” *Id.* at 2. “In providing this data, Stroz utilized industry standard and
17 forensically sound processes to extract user documents from forensic images of devices
18 and repositories collected from NSCA.” *Id.* “Specifically, [Stroz’s] process included
19 recovering available deleted files and maintaining available metadata for each file
20 (including its original location, often referred to [as] a ‘Full Path’, and timestamps).” *Id.*
21 “Once processed into Relativity, the parties were provided this metadata information for
22 each produced file in specific fields that had been agreed upon by the Parties.” *Id.*

23 Stroz further noted that it “collected approximately 279 NSCA devices and
24 repositories for analysis pursuant to the Protocol,” *id.* at 1, upon agreement of the Parties
25 “to broaden the collection strategy under the Protocol to collect every NSCA-owned
26 computer, mobile device, server, and external storage device, regardless of its primary
27 user.” *Id.* at 2. This was because the “NSCA was unable to determine actual relevant
28 custodians and instead identified an extensive list of ‘potential’ custodians” and because

1 “NSCA asset inventory records were inaccurate or incomplete.” *Id.* It was this “expanded
2 collection of devices [that] resulted in an increase in the volume of data that had to be
3 processed, de-duplicated against previously produced documents, searched, and reviewed
4 by the Parties.” *Id.* Accordingly, “[t]he costs associated with [Stroz’s] work under the
5 protocol is largely due to the NSCA’s inability at the outset to help identify the custodians,
6 computer systems and repositories containing potentially relevant information, as required
7 by the Protocol.” *Id.*

8 **LEGAL STANDARD**

9 “Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to
10 impose a wide range of sanctions when a party fails to comply with the rules of discovery
11 or with court orders enforcing those rules.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d
12 585, 589 (9th Cir. 1983). Additionally, district courts have inherent power to “impose
13 sanctions including, where appropriate, default or dismissal.” *Thompson v. Hous. Auth. of*
14 *City of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986) (citing *Link v. Wabash R.R. Co.*, 370 U.S.
15 626 (1961)). Because dismissal is such a severe remedy, however, it should be imposed
16 only in extreme circumstances, and “only where the violation is ‘due to willfulness, bad
17 faith, or fault of the party.’” *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996). To
18 guide its discretion, “a district court should consider a five-part test, with three subparts to
19 the fifth part, to determine whether a case-dispositive sanction” is appropriate. *Conn. Gen.*
20 *Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). These
21 factors are:

- 22 (1) the public’s interest in expeditious resolution of litigation;
23 (2) the court’s need to manage its dockets; (3) the risk of
24 prejudice to the party seeking sanctions; (4) the public policy
25 favoring disposition of cases on their merits; and (5) the
26 availability of less drastic sanctions. The sub-parts of the fifth
27 factor are whether the court has considered lesser sanctions,
whether it tried them, and whether it warned the recalcitrant party
about the possibility of case-dispositive sanctions.

28 *Id.* (footnotes removed).

1 But “[t]his ‘test’ is not mechanical. It provides the district court with a way to think
2 about what to do, not a set of conditions precedent for sanctions or a script that the district
3 court must follow.” *Id.*

4 ANALYSIS

5 I. Evidentiary Objections

6 Each Party has objected to evidence introduced by the other. *See* ECF No. 353-1
7 (“Def.’s Objs.”); ECF No. 376 (“Pl.’s Objs.”); ECF No. 385 (“Def.’s Reply Objs.”). To
8 the extent possible, the Court has endeavored to rely only on the Final Report submitted
9 by the Court-ordered neutral forensic evaluator and, to the extent necessary, on additional
10 evidence to which neither Party has objected. To the extent the Court has relied on
11 evidence to which objections have been made, those objections are **OVERRULED**; the
12 Court **OVERRULES AS MOOT** the Parties’ remaining evidentiary objections.

13 II. Terminating Sanctions

14 CrossFit seeks terminating sanctions on four independent grounds: (1) pursuant to
15 Rule 37(e) for the NSCA’s loss of electronically stored information (“ESI”)⁷; (2) pursuant
16 to Rule 37(c) for the NSCA’s failure to identify all potential witnesses and sources of
17 relevant documents in its initial Rule 26(a) disclosures or to supplement those disclosures
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19 ⁷ This action was filed in May 2014, while the prior version of Rule 37(e) was in effect. *See generally*
20 ECF No. 1. On April 29, 2015, the Supreme Court ordered that the 2015 Amendments to the Federal
21 Rules of Civil Procedure would “take effect on December 1, 2015, and . . . govern in all proceedings in
22 civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” *See*
23 April 29, 2015 Order re Rules of Civil Procedure, *available at* [https://www.supremecourt.gov/orders/](https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf)
24 [courtorders/frcv15\(update\)_1823.pdf](https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf). Further, by statute, “[t]he Supreme Court may fix the extent to
25 which [a proposed] rule [of procedure] shall apply to proceedings then pending, except that the Supreme
26 Court shall not require the application of such rule to further proceedings then pending to the extent that,
27 in the opinion of the court in which such proceedings are pending, the application of such rule in such
28 proceedings would not be feasible or would work injustice, in which event the former rule applies.” 28
U.S.C. § 2074(a). Because the Court concludes that application of the current version of Rule 37(e) is
feasible and would not result in inequity to either Party, the Court will consider CrossFit’s Motion pursuant
to the current version of Rule 37(e). *See, e.g., CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488,
496 (S.D.N.Y. 2016); *Epicor Software Corp. v. Alternative Tech. Sols., Inc.*, No.
SACV1300448CJCJCGX, 2015 WL 12734011, at *1 (C.D. Cal. Dec. 17, 2015) (“Finding no reason why
applying the newly propagated Rule 37(e) would not be ‘just and practicable’ in the instant case, the Court
will apply it here.”).

1 subsequently; (3) pursuant to Rule 37(b) for failure to comply with (a) Magistrate Judge
2 Karen S. Crawford’s July 15, 2015 Order re Joint Motion for Determination of Discovery
3 Dispute re Electronic Discovery (ECF No. 59), (b) this Court’s May 26, 2017 Order
4 Granting in Part and Denying in Part Motion for Sanctions (ECF No. 176), and (c) this
5 Court’s October 19, 2018 Order Setting Scheduling Order (ECF No. 302); and (4) pursuant
6 to the Court’s inherent powers. *See generally* ECF No. 337 (“Pl.’s Mem.”) at 3, 18–39,
7 50.

8 **A. Termination Pursuant to Rule 37(e)**

9 Under Rule 37(e)(2)(C), “[i]f electronically stored information that should have been
10 preserved in the anticipation or conduct of litigation is lost because a party failed to take
11 reasonable steps to preserve it, and it cannot be restored or replaced through additional
12 discovery, the court[,] . . . only upon finding that the party acted with the intent to deprive
13 another party of the information’s use in the litigation[,] may . . . dismiss the action or enter
14 a default judgment.”

15 **1. The NSCA Lost ESI**

16 The first question is whether the NSCA did in fact lose ESI. *See* Fed. R. Civ. P.
17 37(e)(2)(C). ESI is only lost if “it cannot be restored or replaced through additional
18 discovery.” *Id.* CrossFit contends that the NSCA “irrecoverably lost at least **200 devices**
19 and **196 responsive documents**,” *see* Pl.’s Mem. at 19 (emphasis in original); *see also id.*
20 at 19–22. The NSCA maintains that CrossFit has failed to establish that any information
21 of significance to the remaining issues in this case has been lost because “[t]here is no basis
22 to conclude that the 196 documents are relevant and important to the remaining issues in
23 the case” and CrossFit performed no “analysis whether the [200] devices were duplicate
24 devices, devices where the information was transferred to a new device and preserved, or
25 devices that are outside the relevant time frame and scope but were listed anyway for full
26 transparency and disclosure.” Opp’n at 35. Further, “many devices that CrossFit claims
27 were lost or destroyed were produced to, and imaged by, Stroz.” *Id.*

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1 Although the NSCA attempts to minimize the scope of the ESI losses here, “[t]he
2 NSCA does not dispute that over 100 presumptively-responsive documents are lost”
3 or “that over 100 entire devices are lost.” Reply at 11 (emphasis in original). It is evident
4 that presumptively relevant ESI that cannot be replaced through additional discovery was
5 destroyed, *see, e.g.*, Tr. at 42:2–7, 45:1–2, 46:7–21, and that those losses are egregious.

6 Lost Devices: The NSCA produced several asset inventories to CrossFit, which list
7 538 devices. *See* Final Rep. at 11. “Stroz confirmed that [it] has forensically imaged or
8 otherwise collected data from devices named in 225 of those records.” *Id.* In January
9 2019, nineteen months after the Court ordered a forensic evaluation and only three months
10 before Stroz was to submit its Final Report, the NSCA indicated to the Court-appointed,
11 neutral forensic evaluator that it was “[u]nable to determine” whether 240 devices had been
12 provided to Stroz. *See* Final Rep. at 12. The NSCA also indicated that seventeen devices
13 had “possibly” been provided to Stroz; “however, Stroz [wa]s unable to validate this based
14 on the available identifying information for these devices.” *Id.* at 12 & n.7.

15 In its Opposition, filed nearly four months after Stroz submitted its Final Report, the
16 NSCA contends that “many devices that CrossFit claims were lost or destroyed were
17 produced to, and imaged by, Stroz.” Opp’n at 35 (citing Decl. of Michael Massik in
18 Support of Opp’n, ECF No. 353-94, ¶¶ 3–8; Decl. of David Newcomb in Support of Opp’n
19 (“Newcomb Decl.,” ECF No. 353-97) ¶¶ 6, 8, 12–13, 17–18, 20–22; Decl. of Derrick
20 Guerrero in Support of Opp’n (“Guerrero Decl.,” ECF No. 353-89) ¶ 5; Decl. of Virginia
21 Meier in Support of Opp’n, ECF No. 353-95 ¶¶ 6–7; Decl. of Keith Cinea in Support of
22 Opp’n (“Cinea Decl.,” ECF No. 353-85) ¶ 7; Decl. of Robert Eggleton in Support of Opp’n,
23 ECF No. 353-88, ¶ 6; Decl. of Shelby Williamson in Support of Opp’n, ECF No. 353-105,
24 ¶ 5; Decl. of Wendy Silva in Support of Opp’n, ECF No. 353-103, ¶¶ 6–8; Decl. of Teresa
25 Schauer in Support of Opp’n, ECF No. 353-102, ¶ 8; Decl. of Lee Madden (“Madden
26 Decl.,” ECF No. 353-93) ¶ 5; Decl. of Michael Hobson in Support of Opp’n, ECF No. 353-
27 92, ¶¶ 5, 7; Decl. of Tom Hessek in Support of Opp’n, ECF No. 353-91, ¶ 5; Decl. of
28 Carissa Gump in Support of Opp’n, ECF No. 353-90, ¶ 5; Decl. of Mary-Clare Brennan in

1 Support of Opp’n, ECF No. 353-81, ¶ 5); *see also* Ruch Decl. Ex. 1. CrossFit faults “[t]he
2 NSCA’s alleged recent discovery of over 150 previously-missing devices identified on its
3 ‘updated’ asset inventory,” noting that “[t]his simple task should have been completed
4 years ago—before the 2017 Sanctions Order, before the completion of the forensic
5 evaluation, and certainly before CrossFit’s Renewed Motion.” Reply at 16 (emphasis in
6 original). CrossFit further notes that the NSCA’s identification of these devices has been
7 inconsistent. *Id.* at 8. For example, CrossFit notes, *see id.*, two separate declarants each
8 claimed to have been assigned computer BK4CPW1, with one claiming it had been
9 collected by Stroz and the other claiming that it had not been used for normal work and
10 therefore had not been provided to Stroz. *Compare* Guerrero Decl. ¶ 5 (declaring that
11 BK4CPW1 was collected by Stroz in April 2018 as Nos. ES0120a and ES0120b),⁸ *with*
12 Newcomb Decl. ¶ 7 (declaring that BK4CPW1 “was not used for normal work” and “was
13 not collected by Stroz”). Further, CrossFit argues, “[e]ven if this new information were
14 not wholly based upon contradictory declarations by witnesses who have already perjured
15 themselves, the NSCA has given the Court, CrossFit, and the public no reason to trust this
16 belated and self-serving ‘evidence.’” Reply at 9.

17 The Court must agree. The Court ordered the forensic evaluation in May 2017. *See*
18 *generally* ECF No. 176. Because the “NSCA was unable to determine actual relevant
19 custodians and . . . NSCA asset inventory records were inaccurate or incomplete,” Stroz
20 shifted to a device-based collection strategy in April 2018. Final Rep. at 8. Pursuant to
21 the new collection protocol, the NSCA agreed that Stroz would “collect *every* NSCA-
22 owned computer, mobile device, server, and external storage device, regardless of its
23 primary user.” *Id.* This resulted in the collection of over two hundred devices listed in
24 Appendix B to the Final Report. *See id.*; *see also* Final Rep. App. B.

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26
27 ⁸ CrossFit further notes that “the asset inventory log that the NSCA previously provided to Stroz . . . shows
28 that ES0120a and ES0120b refer to a device with a completely different serial number: GDVQDH2.”
Reply at 8–9 (citing ECF No. 319-3 at 3).

1 Based on this device-based collection strategy, Stroz believed it had collected all
2 potentially relevant devices. *See* Tr. at 48:10–19. At the eleventh hour, however, CrossFit
3 and Stroz learned through asset inventories produced in the State Court Action that there
4 were literally hundreds of additional devices that may not have been imaged despite Stroz’s
5 prior collection efforts. *See* Final Rep. at 11; *see also* Tr. at 45:6–19, 48:7–24. Although
6 Stroz provided the NSCA the opportunity to comment, the NSCA was unable to account
7 for at least 240 additional devices before Stroz submitted its Final Report in April 2019.⁹
8 *See* Final Rep. at 12; *see also* ECF No. 319-3; Tr. at 45:20–46:3. The end result is that
9 Stroz was unable to verify that all relevant devices and ESI had been collected. *See* Final
10 Rep. at 12 & n.7; Tr. at 45:6–3, 48:7–24.

11 Even if the Court could trust the NSCA’s belated identification of over 150 of those
12 devices—which, for the reasons discussed above, is difficult—it is too little, too late. The
13 multi-year forensic investigation has closed and, in any event, dozens of devices are still
14 missing. There can simply be no question that the NSCA lost ESI stored on these dozens
15 of unaccounted-for devices. Because entire devices are missing—including devices from
16 the Kraemers, *see* Final Rep. at 9–11; Tr. at 48:25–49:9—it is reasonable to conclude that
17 at least some of this highly relevant ESI cannot be replaced from additional discovery. *See*,
18 *e.g.*, *HP Tuners, LLC v. Sykes-Bonnett*, No. 3:17-CV-05760-BHS, 2019 WL 5069088, at
19 *4 (W.D. Wash. Sept. 16) (concluding that ESI had been “lost” where the defendant
20 destroyed a flash drive and “there is no way of knowing the extent of the evidence
21 contained on the flash drive and there is nothing in the record to indicate that the
22 information is recoverable”), *report & recommendation adopted as modified*, 2019 WL
23 5064762 (Oct. 9, 2019); *see also* Pl.’s Mem. at 20 (“[T]hese key custodians stored unique
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26 ⁹ Despite these hundreds of missing devices, the NSCA maintained at the October 22, 2019 hearing that,
27 following the association of Noonan Lance Boyer & Banach LLP in August 2017, *see* ECF Nos. 206–08,
28 “the focus was to be full disclosure, full transparency,” and “that’s why [the NSCA] agreed to all devices,
not just the 39 custodians. Over, over a hundred people. Secretaries turned in their phones. Custodians.
Everybody turned in their devices. Everybody did.” Tr. at 37:13–19.

1 data locally on their devices—data that is not located through another device or source.”);
2 Reply at 16–17 (regarding the importance of discovery from the Kraemers).

3 Lost Documents: Stroz also identified 196 documents that were permanently deleted
4 but whose file names hit upon one or more of the search terms upon which the Parties had
5 agreed. *See* Final Rep. at 12–13; *see also* Final Rep. App. E; Nahama Decl. Ex. 4. The
6 NSCA first contests that any of these documents were “irrecoverably destroyed.” Opp’n
7 at 20. Stroz opined, however, that “[w]hile deletion evidence may be related to moving
8 documents to another device or volume, the fact that recoverable and processed data was
9 excluded from [its] analysis negates this possibility.” Final Rep. at 13; *see also* Tr. at
10 40:25–41:3. The NSCA’s quibbling over CrossFit’s counsel’s use of the phrase
11 “irrecoverably destroyed” is therefore a non-starter: Stroz has indicated definitively that
12 the files listed in Appendix E were deleted and not otherwise recoverable. *See* Tr. at 46:7–
13 21 (noting that “the items in the chart on page 13 of [Stroz’s] report” are “presumptively .
14 . . relevant” and cannot “be replaced or reconstructed through some means”); *see also* Final
15 Rep. at 12 (“Excluded from this analysis are files, whether deleted or not, whose content
16 was recovered during the harvesting process and made available for review.”).

17 The NSCA further contends that “[t]he fact that a document had a search term ‘hit’
18 does not mean that such document is relevant to the litigation,” Opp’n at 19, and “[t]here
19 is no basis to conclude that the 196 documents are relevant and important to the remaining
20 issues in the case.” *Id.* at 35. For example, the NSCA explains, “[t]here are 20 documents
21 containing the name ‘Russell’ . . . in the file name on a device belonging to Kathryn
22 Russell,” but “[t]hose documents are not related to Russell Berger or Russell Greene, the
23 individuals that the ‘russ*’ search term was designed to capture.” *Id.* at 19. The NSCA
24 contends that many of the other “hits” are “publicly available,” may have been produced
25 to CrossFit, or may fall outside “the relevant scope of time (beginning January 1, 2008).”
26 *Id.* at 20.

27 It is true that some of the 196 presumptively relevant documents listed in Appendix
28 E ultimately may not have proven relevant, but it is also true that some of those documents

1 may have. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (“[B]ecause
2 ‘the relevance of . . . [destroyed] documents cannot be clearly ascertained because the
3 documents no longer exist,’ a party ‘can hardly assert any presumption of irrelevance as to
4 the destroyed documents.’”) (quoting *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173,
5 1205 (8th Cir. 1982)) (alterations in original). For example, Stroz identified 853,699 direct
6 search term hits (plus 391,371 family members) from the 11 million documents harvested
7 from the NSCA during the collection process. *See* Final Rep. at 14; *see also* Final Rep.
8 App. F. Following review for relevance and privilege, 279,554 of those documents were
9 produced to CrossFit. *See* Final Rep. at 15. Nearly a quarter of the hits or their family
10 members were therefore produced; it is fair to assume that a similar proportion of the
11 Appendix E hits also may have proven relevant to this litigation. Consequently, there also
12 can be no question that the NSCA lost ESI that could not be replaced with additional
13 discovery in the form of the 196 documents hitting upon the agreed-upon search terms
14 listed in Appendix E. *See* Final Rep. at 12–13 (indicating that 196 presumptively relevant
15 documents had been deleted and were not otherwise recoverable); Tr. at 46:7–21 (same).

16 The Court therefore concludes that CrossFit has demonstrated that the NSCA lost
17 relevant ESI that cannot be recovered or replaced with additional discovery.

18 2. *The NSCA Did Not Take Reasonable Steps to Preserve ESI*

19 Next, the Court must determine whether the NSCA took reasonable steps to preserve
20 the lost ESI. *See* Fed. R. Civ. P. 37(e)(2)(C). CrossFit urges that the NSCA failed to take
21 reasonable steps to preserve this lost ESI because “[t]he NSCA did not institute *any* written
22 litigation hold until March 2018—four years after inception of this lawsuit, and not until
23 years after *many* additional preservation triggers, including . . . the Court’s 2017 Sanctions
24 Order.” Pl.’s Mem. at 22–23 (emphasis in original) (footnotes omitted). The NSCA
25 protests that it did institute reasonable steps to preserve relevant ESI, citing to deposition
26 testimony from Mr. Cinea that the NSCA verbally informed employees not to delete emails
27 or documents related to this lawsuit on May 15, 2014, days after this lawsuit was filed.
28 Opp’n at 32–33 (citing Ruch Decl. Ex. 14 at 274:11–19; Ruch Decl. Ex. 15 at 724:20–

1 725:1, 725:7–25, 726:5–727:4). CrossFit notes that the NSCA does not dispute “that it
2 failed to modify its Microsoft Exchange default settings and failed to institute a written
3 litigation hold until **March 2018**.” Reply at 13 (emphasis in original).

4 The Court concludes that the NSCA did not take reasonable steps to preserve
5 relevant ESI. Although this action was filed on May 12, 2014, *see generally* ECF No. 1,
6 there is no evidence in the record that the NSCA issued a written litigation hold to its
7 employees until March 2, 2018.¹⁰ *See* ECF No. 311-26 at 462:15–17. Instead, the NSCA
8 relies on the testimony of Mr. Cinea about an all staff meeting allegedly held on May 15,
9 2014, at which the NSCA claims to have verbally instructed employees not to delete
10 “anything relating to the lawsuit.” *See* Opp’n at 32–33 (citing Ruch Decl. Ex. 14 at 274:11–
11 19; Ruch Decl. Ex. 15 at 724:20–725:1, 725:7–25, 726:5–727:4)). Not only is such a verbal
12 instruction insufficient to meet the NSCA’s preservation obligations, *see Mfg. Automation*
13 *& Software Sys., Inc. v. Hughes*, No. CV 16-8962-CAS (KSX), 2018 WL 5914238, at *7
14 (C.D. Cal. Aug. 20, 2018) (concluding that spoliator failed to take reasonable steps to
15 preserve relevant documents where it “never issued any written litigation hold directive to
16 [the plaintiff] group employees, but simply told them verbally to save documents”), but the
17 Court views Mr. Cinea’s testimony with some skepticism.

18 On June 30, 2017, in response to the Court’s May 27, 2017 Order, Mr. Cinea signed
19 a declaration under penalty of perjury that he “ha[d] not destroyed any servers, information
20 on servers, or documents regarding Crossfit or that [he] underst[oo]d to be relevant to this
21 action.” ECF No. 189-3 ¶ 4. Between December 2 and 8, 2016, however, prior to signing
22 his declaration of June 30, 2017, Mr. Cinea deleted six presumptively relevant documents
23 whose file names hit on terms such as interval training, high intensity, and power training.
24 *See* Final Rep. App. E; *see also* Nahama Decl. Ex. 4. On September 5, 2017, only a couple
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27 ¹⁰ There are vague references in the NSCA’s briefing and at oral argument to other litigation holds. *See*,
28 *e.g.*, Opp’n at 33 (“[T]here were other litigation hold letters.”); Tr. at 29:5–30:3. But “other possible
communications that could count as a legal hold [are] not in the record and [are] insufficient.” Tr. at
54:13–19.

1 of months after signing his declaration, Mr. Cinea also deleted a pdf entitled “CrossFit_
2 The Good Fight – YouTube.” *Id.* Because Mr. Cinea himself destroyed presumptively
3 relevant documents—including after the Court’s May 27, 2017 Order sanctioning the
4 NSCA and after filing his declaration on June 30, 2017—the Court has little confidence
5 that Mr. Cinea did instruct, or was capable of instructing, NSCA staff on their duty to
6 preserve documents relevant to this litigation.

7 The NSCA also claims that “[t]he immense volume of data retrieved, including the
8 number of devices that were imaged and the time period covered by the documents
9 preserved, confirm that the preservation efforts were not only reasonable but that they
10 worked.” Opp’n at 33. But this ignores the massive losses of ESI identified by Stroz, *see*
11 Final Rep. at 11–13; *see also* Final Rep. App. E, and discussed above, *see supra* Section
12 II.A.1, which bolster the conclusion that the NSCA’s long-standing failures to implement
13 a formal litigation hold or modify its document retention policies were unreasonable.

14 Accordingly, the Court concludes that CrossFit has demonstrated that the NSCA
15 failed to take reasonable steps to preserve ESI. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*,
16 888 F. Supp. 2d 976, 998 (N.D. Cal. 2012) (“By failing to do as little as issue
17 a litigation hold notice to any employees for eight months after its preservation duty arose,
18 and by further delaying issuance of litigation hold notices to several key custodians, the
19 Court finds that [the plaintiff] acted with not just simple negligence but rather conscious
20 disregard of its duty to preserve.”).

21 3. *The NSCA Acted with the Requisite Intent*

22 Finally, the Court must determine whether the NSCA “acted with the intent to
23 deprive [CrossFit] of the information’s use in th[is] litigation.” *See* Fed. R. Civ. P.
24 37(e)(2)(C). CrossFit argues that it is clear that the NSCA acted with the requisite intent
25 because “over **33,000 responsive documents were moved to deleted items folders**
26 **during the pendency of this lawsuit.**” Pl.’s Mem. at 24 (emphasis in original) (citing
27 Decl. of Chris G. Haley in Support of Mot. (“Haley Decl.,” ECF No. 328) ¶ 24); *see also*

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1 Reply at 13.¹¹ The NSCA counters that CrossFit has not proven by clear and convincing
2 evidence that the NSCA acted with the intent to deprive CrossFit of using the lost ESI,
3 while the NSCA’s voluntary agreement to expand the scope of the Stroz collection and
4 “[t]he fact that the NSCA actually preserved and produced all relevant data over a 10-year
5 time period dating back to January 1, 2008, is strong evidence that the NSCA did not act
6 with the intent to deprive CrossFit of any relevant information.” Opp’n at 37. CrossFit
7 responds that, “[t]ellingly, of the 23 new declarations submitted by the NSCA[,] **not a**
8 **single NSCA employee declared that he or she never attempted to destroy responsive**
9 **documents.**” Reply at 14 (emphasis in original).

10 As a preliminary matter, the NSCA contends that CrossFit must prove its intent by
11 clear and convincing evidence, *see* Opp’n at 36–37 (citing *Lokai Holdings LLC v. Twin*
12 *Tiger USA LLC*, No. 15cv9363 (ALC) (DF), 2018 WL 1512055 (S.D.N.Y. Mar. 12, 2018);
13 *CAT3, LLC*, 164 F. Supp. 3d at 499), whereas CrossFit disputes it must meet such a
14 standard. *See* Reply at 14 n.61 (citing *Hugler v. Sw. Fuel Mgmt., Inc.*, No. 16 CV 4547-
15 FMO (AGRx), 2017 WL 8941163, at *10 (C.D. Cal. May 2, 2017). Prior to the 2015
16 Amendment to Rule 37(e), it appears that this District applied a preponderance-of-the-
17 evidence standard. *See Gen. Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290, 296 (S.D.
18 Cal. 1981). The NSCA relies on non-published and non-binding authorities to support its
19 proposition that, “after the 2015 Amendment to Rule 37(e), several courts have held that
20 intent to deprive another of using information must be proved by clear and convincing
21 evidence.” Opp’n at 36 (citing *Lokai Holdings LLC*, 2018 WL 1512055; *CAT3, LLC*, 164
22 F. Supp. 3d at 499). But at least one district court within the Ninth Circuit applying the
23 amended version of Rule 37(e) has indicated that “[t]he applicable standard of proof
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25 ¹¹ This deletion analysis was undertaken by Chris G. Haley, the Director of Legal Technology at Troutman
26 Sanders eMerge LLC. *See generally* Haley Decl. Not surprisingly, the NSCA objects strenuously to his
27 analysis. *See, e.g.*, Opp’n at 15–18; ECF No. 353-1 at 20–47. Although the Court would be inclined to
28 conclude that the Haley Declaration—which undoubtedly bolsters a finding of the NSCA’s intent to
deprive CrossFit of the lost ESI—is admissible, the Court ultimately concludes that the Haley Declaration
is not necessary to support its conclusion.

1 for spoliation motions in the Ninth Circuit is the preponderance of evidence.” *OmniGen*
2 *Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D. Or.) (citing *Compass Bank v.*
3 *Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1052–53 (S.D. Cal. 2015);
4 *LaJocies v. City of N. Las Vegas*, No. 2:08-CV-00606-GMN, 2011 WL 1630331, at *1 (D.
5 Nev. Apr. 28, 2011)), *appeal dismissed*, No. 17-35519, 2017 WL 6507124 (9th Cir. Oct.
6 5, 2017). The Court therefore concludes that the preponderance-of-the-evidence standard
7 continues to apply.

8 Whatever the applicable standard, however, it is clear that CrossFit has met it here:
9 CrossFit adequately has demonstrated that the NSCA acted with intent to deprive CrossFit
10 of the lost ESI. “A party’s destruction of evidence can be considered willful or in bad faith
11 when the party had notice that the evidence was potentially relevant to litigation before it
12 was destroyed.” *HP Tuners, LLC*, 2019 WL 5069088, at *4 (citing *Leon*, 464 F.3d at 959).
13 A review of the NSCA’s discovery misconduct reveals that this is such a case.

14 Here, CrossFit filed its initial complaint on May 12, 2014, *see generally* ECF No. 1,
15 and its initial requests for production in June 2014. *See* ECF No. 32-4 Ex. 1. Among other
16 things, CrossFit requested “[a]ll documents and communications referring or relating to
17 CrossFit,” *id.* at 8, and “[a]ll documents and communications concerning the Devor Study.”
18 *Id.* at 9. On August 27, 2014, acting on a joint motion filed by the Parties, *see* ECF No.
19 13, Magistrate Judge Crawford ordered that “[t]he relevant time period for collection and
20 production of documents is January 1, 2008[,] through the date the Complaint was filed”
21 and that the “Parties shall preserve data from as early as January 1, 2008[,] to the extent
22 such data still exists on an active data source and subject to the exception” for privileged
23 data.¹² ECF No. 17 ¶ 22. Magistrate Judge Crawford also ordered that “[p]reservation of
24 potentially relevant ESI shall be reasonable and proportionate” and that “[t]he Producing
25 Party shall take reasonable steps to collect and process documents using methods that avoid
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27 ¹² The relevant time period established by Magistrate Judge Crawford further undermines the NSCA’s
28 argument that some of the unaccounted-for devices are not relevant because they “dat[e] back to 2010.”
See Tr. at 33:12–13.

1 spoliation of data.” *Id.* ¶ 23. Finally, Magistrate Judge Crawford ordered that “[t]he parties
2 will endeavor to produce documents in a reasonably timely manner.” *Id.* ¶ 45.

3 But as of December 2014, the NSCA had produced only approximately 300
4 documents in response to CrossFit’s initial requests for production. *See* ECF No. 32 at 3.
5 Because the NSCA “had not adequately addressed the apparent gaps in the documents that
6 were produced,” ECF No. 59 at 8, Magistrate Judge Crawford granted CrossFit’s “request
7 for an order compelling ‘transparency’ in the discovery process.” *Id.* at 2. As a result, she
8 ordered the NSCA to, among other things, “provide plaintiff with declarations by defense
9 counsel and defendant’s representative(s) stating under penalty of perjury that all
10 documents responsive to plaintiff’s document requests have been produced ‘to the best of
11 the person’s knowledge, information and belief formed after a reasonable inquiry.’” *Id.* at
12 10 (quoting Fed. R. Civ. P. 26(g)).

13 As of May 26, 2017, however, the NSCA had produced only 439 documents.
14 Nahama Decl. ¶ 12.¹³ After CrossFit discovered that the NSCA had withheld relevant and
15 responsive documents, the Court imposed various sanctions and ordered the NSCA to pay
16 for a neutral forensic evaluation of its servers. *See generally* ECF No. 176. The Court-
17 appointed neutral forensic evaluator ran the keywords to which the Parties agreed on twelve
18 Terabytes of data harvested from the NSCA, yielding 1,245,070 presumptively relevant
19 documents, comprised of 853,699 direct hits on the search terms plus family members. *See*
20 Final Rep. at 14. Among these were 66,614 direct hits for the terms “crossfit,” “cross fit,”
21 “xfit,” and “x fit,” and 5,621 direct hits for “Devor Article” and “Devor Study.” *See* Final
22 Rep. App. F. As of the conclusion of the Court-ordered neutral forensic evaluation, the
23 NSCA had produced an additional 279,554 documents. *See* Final Rep. at 15. Further,
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27 ¹³ When the Court asked the NSCA’s counsel at the October 22, 2019 hearing whether it “concede[d] that
28 NSCA produced less than 450 documents as of May, 2017,” counsel responded that he “was not involved
in the case” at that time and therefore “d[id]n’t have personal knowledge.” *See* Tr. at 3315–22. The Court
therefore accepts as true Mr. Namaha’s testimony, to which the NSCA did not object.

1 there remain questions as to the completeness of this production. *See, e.g.*, Tr. at 14:2–8,
2 14:23–25, 17:4–6, 20:3–5, 45:6–46:3, 48:7–49:9, 72:21–24.

3 Not only is it clear that the NSCA knowingly and repeatedly resisted producing
4 documents that were irrefutably relevant to this litigation, but the forensic evaluation also
5 uncovered evidence that the NSCA *destroyed* presumptively relevant documents and
6 engaged in mass deletions across numerous devices during the pendency of this litigation.
7 *See* Final Rep. at 13. In fact, Stroz was unable to recover over 100 documents whose
8 filenames hit on the Parties’ agreed-upon search terms. *See id.*; *see also* Final Rep. App.
9 E; Nahama Decl. Ex. 4. Among these were pdfs titled “CrossFit_ The Good Fight –
10 YouTube” and “Cambio, Todd M. Crossfit.” Final Rep. App. E; Nahama Decl. Ex. 4.
11 Stroz also noted several mass deletion events *during the pendency of this litigation*—
12 including *after the May 26, 2017 Order imposing sanctions*—some of which resulted in
13 the deletion of presumptively relevant documents. *See* Final Rep. at 13; *id.* App. E.

14 In short, the NSCA has been on notice since 2014 that documents pertaining to
15 CrossFit and the Devor Study are relevant to this litigation; nonetheless, there is no
16 evidence that the NSCA implemented a formal litigation hold until March 2, 2018. *See*
17 ECF No. 311-26 at 462:15–17. In the meantime, the NSCA long withheld clearly
18 responsive documents and—during CrossFit’s interminable battle to obtain those
19 documents—the NSCA’s employees continuously deleted presumptively relevant
20 documents, including some that contained the term “CrossFit” *in the filename*. Under such
21 circumstances, “[the NSCA]’s resistance to preserving [presumptively relevant ESI]
22 supports the reasonable inference that Defendant[] acted with the *intent* to deprive
23 [CrossFit] of the use of the [ESI].” *See Hugler*, 2017 WL 8941163, at *10 (emphasis in
24 original); *see also HP Tuners, LLC*, 2019 WL 5069088, at *4 (defendant intentionally
25 spoliated flash drive where he “was aware[] that the information on the flash drive was
26 relevant, that he was obligated to preserve the evidence and that he was required to produce
27 the flash drive” and, “[d]espite being aware of these facts, [the defendant] intentionally
28 destroyed the flash drive”); *OmniGen Research*, 321 F.R.D. at 372 (defendants

1 intentionally spoliated ESI when one of its employees “intentionally deleted over 200 files
2 from his Lenovo laptop, at least 44 of which were not recoverable,” and at least some of
3 the documents had filenames “that are most certainly relevant to this litigation”); Tr. at
4 56:1–4 (“It takes an intentional effort . . . to move items to deleted items folders.”).

5 4. *CrossFit Has Been Prejudiced*

6 The NSCA intimates that terminating sanctions are inappropriate because CrossFit
7 cannot establish that it has been prejudiced. *See* Opp’n at 18–23. But CrossFit need not
8 establish prejudice where, as here, the Court has concluded that the NSCA acted with intent
9 to deprive CrossFit of the lost ESI, *see supra* Section II.A.3:

10 Subdivision (e)(2) does not include a requirement that the court
11 find prejudice to the party deprived of the information. This is
12 because the finding of intent required by the subdivision can
13 support not only an inference that the lost information was
14 unfavorable to the party that intentionally destroyed it, but also
15 an inference that the opposing party was prejudiced by the loss
of information that would have favored its position. Subdivision
(e)(2) does not require any further finding of prejudice.

16 Fed. R. Civ. P. 37(e)(2) advisory committee’s note to 2015 amendment.

17 In any event, the Court concludes that CrossFit has demonstrated that it has been
18 prejudiced by the loss of ESI here. As but one example, CrossFit notes that “ESI from the
19 Kraemers’ NSCA-owned devices”—ESI that “is central to CrossFit’s ability to prove the
20 NSCA’s liability . . . , and its request for damages”—“were ‘factory reset’ and/or withheld
21 from the forensic evaluation.” Pl.’s Mem. at 25–26; *see also* Reply at 17 (“CrossFit’s
22 inability to review ESI from the primary devices of [the Kraemers] directly prejudices its
23 ability to prove the scope of the . . . damages to CrossFit.”); Tr. at 48:25–49:9. Of course
24 the loss of the Kraemers’ ESI is prejudicial to CrossFit,¹⁴ and—to reiterate—this is but one
25 example of the abundance of potentially relevant ESI that was lost here.

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28 ¹⁴ The importance of the Kraemers’ devices is underscored by the fact that the NSCA disclosed only two
witnesses in its Rule 26(a) disclosures: Dr. Kraemer and Mr. Cinea. *See* Tr. at 18:15–20.

1 Because CrossFit has established that the NSCA intended to and did deprive
2 CrossFit of ESI relevant to this litigation and because the five factors the Ninth Circuit has
3 articulated for considering imposing terminating sanctions weigh in favor of termination,
4 *see infra* Section II.D, the Court concludes that termination is appropriate and therefore
5 **GRANTS** CrossFit’s Motion to the extent it seeks termination pursuant to Rule 37(e)(2).
6 *See, e.g., OmniGen Research*, 321 F.R.D. at 377.

7 ***B. Termination Pursuant to Rule 37(c)***

8 Pursuant to Rule 37(c)(1), “[i]f a party fails to provide information or identify a
9 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
10 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
11 substantially justified or is harmless.” Further, “the court, on motion and after giving an
12 opportunity to be heard . . . may impose other appropriate sanctions, including any of the
13 orders listed in Rule 37(b)(2)(A)(i)–(vi).” Fed. R. Civ. P. 37(c)(1)(C).

14 CrossFit contends that termination pursuant to Rule 37(c) is appropriate because the
15 NSCA failed “to (i) identify all potential witnesses and sources of relevant documents in
16 its initial Rule 26(a) disclosures, and (ii) supplement its initial disclosures with additional
17 potential witnesses and documents.” Pl.’s Mem. at 28 (footnote omitted) (citing Fed. R.
18 Civ. P. 37(c)(1)(C)). The NSCA counters that it “did not fail to provide information or
19 identify a witness as required by FRCP Rule 26(a) or (e),” Opp’n at 38, because “the NSCA
20 was only required to identify those witnesses and documents that it might use to defend
21 itself,” *id.* (citing Fed. R. Civ. P. 26(a)(1)(A)(i)), and “[t]he NSCA met this burden.” *Id.*
22 The NSCA adds that “the additional witnesses and documents [identified by Stroz] are not
23 witnesses or documents that the NSCA intends to use on the remaining issues at trial.” *Id.*
24 at 39.

25 The NSCA is correct that Rule 26(a) required it to disclose only those “individual[s]
26 likely to have discoverable information . . . that the disclosing party may use to support its
27 claims or defenses, unless the use would be solely for impeachment.” Fed. R. Civ. P.
28 26(a)(1)(A)(i). Given the NSCA’s admission that it does not intend to use any witnesses

1 not listed in its initial disclosure, *see* Opp’n at 39, the Court determines that the NSCA did
2 not violate either Rule 26(a) or Rule 26(e). Accordingly, the Court **DENIES** CrossFit’s
3 Motion to the extent it seeks sanctions pursuant to Rule 37(c). *See, e.g., Myers ex rel.*
4 *Myers v. United States*, No. 02CV1349-BEN(AJB), 2004 WL 7323087, at *3 (S.D. Cal.
5 Nov. 22, 2004) (denying sanctions where party conceded in opposition that it had no intent
6 to use witnesses not disclosed under Rule 26(a)(1)(A)(i) in support of its defenses at trial
7 because that party “was not obligated to . . . identify [two witnesses] under Fed. R. Civ. P.
8 26(a)(1)”).

9 **C. Termination Pursuant to Rule 37(b)**

10 Under Rule 37(b)(2)(A), “[i]f a party . . . fails to obey an order to provide or permit
11 discovery . . . , the court where the action is pending may issue further just orders.” Such
12 orders “may include . . . striking pleadings in whole or in part; . . . dismissing the action[;]
13 or . . . rendering default judgment against the disobedient party.” Fed. R. Civ. P.
14 37(b)(2)(A)(iii), (v)–(vi). “[W]here the drastic sanctions of dismissal or default are
15 imposed, . . . the losing party’s noncompliance must be due to willfulness, fault, or bad
16 faith.” *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (quoting
17 *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997)) (internal quotation marks
18 omitted). “The willfulness standard is met by disobedient conduct that is within the
19 offending party’s control.” *Fab Films, LLC v. JP Morgan Chase Bank, N.A.*, No. CV 16-
20 1722 PSG (SSX), 2017 WL 1287675, at *2–3 (C.D. Cal. Feb. 28) (citing *Stars’ Desert Inn*
21 *Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 525 (9th Cir. 1997); *In re Visioneering*
22 *Const.*, 661 F.2d 119, 121 (9th Cir. 1981)), *report and recommendation adopted*, 2017 WL
23 1276945 (Apr. 4, 2017).

24 CrossFit asks the Court to enter default judgment against the NSCA for its “fail[ure]
25 to comply with multiple discovery orders throughout this matter, including (i) the Court’s
26 2015 Discovery Order, ordering the NSCA’s full and complete document production;
27 (ii) the Court’s 2017 Sanctions Order, requiring the NSCA to file declarations of
28 ///

1 compliance; and (iii) the Court’s October 2018 Scheduling Order, requiring the NSCA to
2 complete production of documents by January 2, 2019.” Pl.’s Mem. at 29–30.

3 1. *The 2015 Discovery Order*

4 On July 15, 2015, Magistrate Judge Crawford ordered the NSCA to provide CrossFit
5 with declarations (1) identifying “[t]he process of processes used by defendant to locate
6 documents and information responsive to plaintiff’s document requests, including but not
7 limited to the search terms and/or date ranges used,” ECF No. 59 at 9; (2) “explain[ing] . . .
8 why defendant believe[d] the processes used . . . were reasonable under the circumstances,”
9 *id.*; (3) outlining “[t]he document retention policies and/or practices being applied by the
10 key custodians and entities,” *id.*; (4) “explain[ing] . . . any apparent gaps in the documents
11 and information produced,” *id.*; and (5) “stating under penalty of perjury that all documents
12 responsive to plaintiff’s document requests have been produced ‘to the best of the person’s
13 knowledge, information and belief formed after a reasonable inquiry.’” *Id.* at 10 (quoting
14 Fed. R. Civ. P. 26(g)). CrossFit contends that “[t]he NSCA failed to comply with this
15 order” as evidenced by the NSCA’s production of only 439 documents prior to the Court’s
16 imposition of sanctions on May 26, 2017, *see* Pl.’s Mem. at 30 (citing Haley Decl. ¶ 29;
17 Nahama Decl. ¶ 12), compared to the identification of over 1.3 million presumptively
18 relevant documents during the course of the forensic evaluation, including over 37,900 de-
19 deduplicated documents containing variations of the terms “CrossFit” and “Devor.” *Id.*
20 (citing Final Rep. at 15; Haley Decl. ¶ 19).

21 The NSCA counters that it has “substantially complied” with Magistrate Judge
22 Crawford’s July 15, 2015 Order because “[t]he Stroz Forensic evaluation encompassed
23 each item the Court ordered the NSCA to address.” Opp’n at 42–43. CrossFit responds
24 that “the NSCA cannot shift its Court-ordered discovery obligations onto Stroz” and adds
25 that “[t]he NSCA remains in violation of the 2015 Discovery Order” because “the Forensic
26 Evaluation did not include the requisite sworn declaration by NSCA custodians ‘as to why
27 defendant believes the processes used to locate and product documents and information in
28 ///

1 response to plaintiff's document requests were reasonable under the circumstances.”
2 Reply at 18 (quoting ECF No. 59 at 9).

3 The Court-ordered forensic evaluation revealed the true extent of the NSCA's failure
4 to abide by Magistrate Judge Crawford's July 15, 2015 Order. Essentially, Magistrate
5 Judge Crawford's Order “compell[ed] ‘transparency’ in the discovery process . . . to ensure
6 disclosure of all documents and information responsive to [CrossFit's] documents
7 requests.” ECF No. 59 at 2. Unfortunately, that Court-ordered transparency remains
8 elusive—to CrossFit, to the Court, and even to the NSCA itself.

9 For example, Magistrate Judge Crawford ordered the NSCA to provide a declaration
10 containing “the search terms . . . used to locate documents.” *Id.* at 9. Time and again, the
11 NSCA has purported to provide such a list and, with each iteration, it has become more
12 doubtful that such a list ever existed. In its overview of the NSCA's search and collection
13 efforts, Stroz noted that the NSCA's Senior Director of Technology, Wayde Rivinius,
14 “ha[d] not provided the search queries” used for the NSCA's searches of the Office 365
15 platform and had been “unable to provide” the queries used to search Jira and Confluence.
16 Final Rep. at 5. Mr. Rivinius informed Stroz that the NSCA's IT department had developed
17 scripts “to search the desktops, servers, and archive backups,” but “Mr. Rivinius was
18 unable to provide these scripts.” *Id.* Additionally, “[c]urrent NSCA employees developed
19 an XML file containing search criteria extracted from the various Requests for Production,”
20 but “log files recorded by the scripts . . . were not provided to Stroz.” *Id.* at 6. Mr. Rivinius
21 also noted an initial collection process at the behest of Mr. Cinea “for individuals to
22 perform specific searches across their files,” although “Mr. Rivinius [wa]s unsure if any
23 direct instructions or protocols were provided to those individuals advising them how to
24 perform those searches” and “[n]o system-wide searches involving IT staff occurred at that
25 time.” *Id.* at 6–7. Stroz requested that the NSCA provide a list of search terms that the
26 NSCA had used in both this and the State Court Action, but the “NSCA was unable to
27 verify that the listed keywords, or even which keywords, were used to produce responsive
28 documents in the proceedings.” *Id.* at 14; *see also* Final Rep. App. B. Consequently,

1 “Stroz and the Parties came to decide on a process for the Parties to propose and reach
2 agreement on a set of keywords to be applied.” Final Rep. at 14; *see also* Final Rep. App.
3 D.

4 The NSCA’s actions with regard to its purported search terms have been the
5 antithesis of transparency. Rather than candidly concede that it could not confirm its search
6 terms in August 2015 (when the NSCA presumably provided the declarations ordered by
7 Magistrate Judge Crawford), or in late 2017 (when purporting to provide search terms to
8 Stroz as part of the protocol for the forensic evaluation), the NSCA has led CrossFit and
9 the Court through four years of obfuscation and, perhaps, perjury. The Court therefore
10 concludes that the NSCA has repeatedly and willfully failed to comply with Magistrate
11 Judge Crawford’s July 15, 2015 Order.

12 2. *The 2017 Sanctions Order*

13 In its May 26, 2017 Order, the Court ordered the NSCA, “under penalty of perjury,
14 [to] acquire declarations from all relevant NSCA personnel either (a) assuring or
15 reaffirming that no documents relevant to this litigation have been destroyed or
16 (b) admitting to any destruction.” ECF No. 176 at 10. CrossFit argues that “[n]ot only did
17 the NSCA omit multiple ‘relevant NSCA personnel,’ [but] the forensic evaluation
18 discovered that the NSCA compliance declarants who swore they had not deleted
19 anything[] in fact deleted **7,900 documents—1,500** of which contained either ‘CrossFit’
20 or ‘Devor.’” Pl.’s Mem. at 31 (emphasis in original) (citing Haley Decl. ¶ 25). CrossFit
21 therefore urges that “[t]he NSCA’s **perjurious compliance declarations are**
22 **independently sufficient grounds to terminate this case.**” *Id.* at 32 (emphasis in
23 original) (citing *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011)).

24 The NSCA responds that it did not violate the Court’s May 26, 2017 Order because
25 “[t]he forensic analysis is completed, including a forensic analysis well beyond what was
26 set forth in the Sanctions Order,” “[t]he NSCA paid the costs of that forensic analysis,” and
27 “[t]he NSCA submitted the required employee declarations that made the required
28 statements.” Opp’n at 41 (citing ECF Nos. 178–178-8, 189–189-13).

1 It matters naught that the NSCA’s employees “made the required statements”—
2 under penalty of perjury—in the Court-ordered compliance declarations if those employees
3 then spoliated the very documents they had assured CrossFit and the Court had not been
4 destroyed. CrossFit’s evidence, which the NSCA fails adequately to negate, is appalling.
5 For example, CrossFit argues that Appendix E to Stroz’s Final Report “shows that 50
6 ‘Potentially Relevant Documents’ were destroyed by three compliance declarants.” Reply
7 at 18. Appendix E reveals that Carwyn Sharp deleted thirty-nine presumptively relevant
8 documents between November 2015 and October 2017, both before and after filing his
9 compliance declarations on June 9 and 30, 2017, *see* ECF Nos. 178-7, 189-12; Mr. Cinea
10 deleted six presumptively relevant documents in December 2016, and—most troubling—
11 a pdf entitled CrossFit_ The Good Fight – YouTube on September 5, 2017, shortly after
12 filing his compliance declaration on June 30, 2017, *see* ECF No. 189-3; and Mr. Madden
13 deleted three presumptively relevant documents on November 2, 2017, after filing his
14 compliance declarations on June 9 and 30, 2017.¹⁵ *See* ECF Nos. 178-3, 189-6. Other
15 presumptively relevant documents from Appendix E were from the NSCA’s local files or
16 external drives, rendering it impossible for CrossFit or the Court to determine whether any
17 of the compliance declarants were responsible for their deletion.¹⁶ *See generally* Final Rep.

18
19 ¹⁵ The NSCA argues that the majority of the presumptively relevant documents listed in Appendix E to
20 Stroz’s Final Report are non-responsive, publicly available, or not relevant to the issues remaining in this
21 case. *See* Opp’n at 18–21. The documents deleted by Dr. Sharp, for example, largely appear to be pdfs
22 of journal articles. *See* Final Rep. App. E; *see also* Nahama Decl. Ex. 4. As CrossFit notes, however, it
23 is impossible to say with any certainty that these files—which the NSCA has destroyed—do not contain
24 relevant information, such as handwritten notes. *See* Reply at 13. This is why the documents are
25 *presumptively* relevant: the documents hit upon the keywords to which the Parties agreed and, because
26 “‘the relevance of . . . [destroyed] documents cannot be clearly ascertained because the documents no
27 longer exist,’ a party ‘can hardly assert any presumption of irrelevance as to the destroyed
28 documents.’” *Leon*, 464 F.3d at 959 (quoting *Alexander*, 687 F.2d at 1205). Further, because the Court
concluded that the NSCA destroyed the documents with intent to deprive CrossFit of them, *see supra*
Section II.A.3, the relevance of those documents is presumed. *See supra* Section II.A.4.

¹⁶ To be clear, the deletion of the documents in Appendix E is troubling whether or not committed by a
compliance declarant; their deletion by compliance declarants is rendered exponentially more
consequential by virtue of the declarants’ assurances—under penalty of perjury—that they had not
knowingly destroyed any relevant documents.

1 App. E; *see also* Nahama Decl. Ex. 4. And, of course, Appendix E contains only those
2 files that were destroyed but whose filenames Stroz succeeded in recovering; consequently,
3 it is entirely possible that those documents represent only the tip of the spoliation iceberg.
4 Although Mr. Cinea and Mr. Madden each signed a declaration in support of the NSCA's
5 Opposition, neither addresses the deletion of the presumptively relevant documents
6 identified in Appendix E to Stroz's Final Report. *See generally* Cinea Decl.; Madden Decl.
7 The NSCA did not even file a declaration from Dr. Sharp. *See generally* ECF No. 353.

8 CrossFit also notes that "752 . . . documents were destroyed by compliance declarant
9 Lee Madden in a 'Mass Deletion Event' on November 2, 2017—months after the 2017
10 Sanctions Order and during the Forensic Evaluation."¹⁷ Reply at 18 (emphasis in original)
11 (citing Final Rep. at 13). Although Mr. Madden filed a declaration in support of the
12 NSCA's Opposition, he fails to address the mass deletion event identified by Stroz. *See*
13 *generally* Madden Decl.

14 The Court therefore concludes that CrossFit has introduced evidence that the NSCA
15 has repeatedly and willfully failed to comply with the Court's May 26, 2017 Order by filing
16 multiple declarations falsely affirming that no documents relevant to this litigation had
17 been destroyed and by continuing to destroy presumptively relevant documents following
18 the filing of those declarations.

19 3. *The October 2018 Scheduling Order*

20 Finally, CrossFit contends that "the NSCA has repeatedly failed to comply with
21 multiple scheduling orders—most recently, the Court's October 19, 2018 Order." Pl.'s
22 Mem. at 32. Specifically, on October 19, 2018, the Court ordered the "NSCA to complete
23 document review, serve privilege logs, and turn documents over to CrossFit" by January 2,
24 2019. ECF No. 302 at 26. CrossFit contends that, "[b]etween January 2, 2019, and
25

26
27 ¹⁷ Unidentified individuals deleted nearly 6800 documents from an NSCA external drive on January 21,
28 and March 2, 2016. *See* Final Rep. at 13. Again, the Court cannot rule out that these deletions were also
committed by or at the behest of any of the compliance declarants, although the Court reiterates that their
deletion is troublesome in either event.

1 [June 20, 2019], the NSCA has belatedly produced over 69,400 documents; 19,500
2 privilege log entries; and 260,400 ‘non-responsive log’ entries.” Pl.’s Mem. at 32 (citing
3 Nahama Decl. ¶ 80; Haley Decl. ¶ 34).

4 The NSCA contends that it did not violate the Court’s October 19, 2018 Order
5 because “the vast majority of the documents (58,275 of the over 69,400 documents
6 produced after January 2, 2019) were duplicative email threads.” Opp’n at 41. Although
7 “CrossFit did not agree that the NSCA could use email threading to filter out and not
8 produce the duplicative emails contained within the complete email threads,” *id.* at 42, the
9 NSCA produced the approximately 242,000 duplicative documents on January 28, 2019.
10 *Id.* (citing Ruch Decl. ¶ 17). CrossFit responds that, although the content of the belatedly
11 produced documents themselves may not have been new, “[e]ach email that the NSCA
12 produced after January 2, 2019, contains unique metadata—the very type of metadata that
13 evidences the NSCA’s attempt to destroy over 33,000 documents.” Reply at 18 (citing
14 Haley Reply Decl. ¶ 15). Consequently, “[t]he NSCA’s attempt to withhold valuable
15 metadata on approximately 242,000 documents through email threading violates the
16 Forensic Protocol and multiple discovery orders, including the 2018 Scheduling Order.”
17 *Id.*

18 The Court ordered the NSCA to “complete its review of the documents” and “turn
19 [the] documents over to CrossFit” on or before January 2, 2019. *See* ECF No. 302 at 26,
20 27. The Court did not carve out an exception for “duplicative” documents, *see generally*
21 *id.*, nor—as the NSCA itself concedes, *see* Opp’n at 42—did CrossFit agree to the NSCA’s
22 use of “email threading.” Instead, the NSCA produced those documents several weeks
23 later, on January 28, 2019, *see* Ruch Decl. ¶ 17, eating into CrossFit’s narrow review
24 window.¹⁸ *See* ECF No. 302 at 26.

25 ///

26
27 ¹⁸ To be clear, the Court does not fault the NSCA for its failure to produce the Editorial Manager System
28 documents until after January 2, 2019, given that Stroz was unable to make those documents available to
the NSCA for review until March 14, 2019. *See* Final Rep. at 14.

1 Although the NSCA's failure to abide by the Court's October 19, 2018 Scheduling
2 Order may not itself merit terminating sanctions, it further bolsters an already extensive
3 record of the NSCA's repeated and willful failure to comply with the other discovery
4 Orders and deadlines detailed above. *See supra* Sections II.C.1–2. Viewing this evidence
5 cumulatively, the Court concludes that CrossFit has demonstrated the NSCA's repeated
6 and willful failure to comply with its Court-ordered discovery obligations. Accordingly,
7 the Court **GRANTS** CrossFit's request for termination pursuant to Federal Rule of Civil
8 Procedure 37(b). *See, e.g., Wyle*, 709 F.2d at 590 (affirming district court's issuance of
9 terminating sanctions where "[s]ufficient evidence support[ed] the district court's finding
10 that [the plaintiff], through [its counsel], willfully failed to comply with discovery orders");
11 *see also Reddy v. Gilbert Med. Transcription Serv., Inc.*, 467 F. App'x 622, 624 (9th Cir.
12 2012) ("The district court did not abuse its discretion by imposing terminating sanctions
13 under Fed. R. Civ. P. 37(b)(2) based on [the plaintiff]'s willful and repeated violations of
14 the court's discovery orders after the court had imposed monetary sanctions and warned
15 [the plaintiff] of the possibility of terminating sanctions.").

16 ***D. Termination Pursuant to the Court's Inherent Powers***

17 The Court also may issue terminating sanctions pursuant to its inherent powers. *See*
18 *Thompson*, 782 F.2d at 831. As discussed above, *see supra* at pages 7–8, and in the Court's
19 May 26, 2017 Order, *see* ECF No. 176 at 6, the Ninth Circuit has laid out a five-part test
20 for courts to consider in determining whether case-dispositive sanctions are appropriate:

21 (1) the public's interest in expeditious resolution of litigation;
22 (2) the court's need to manage its dockets; (3) the risk of
23 prejudice to the party seeking sanctions; (4) the public policy
24 favoring disposition of cases on their merits; and (5) the
25 availability of less drastic sanctions. The sub-parts of the fifth
26 factor are whether the court has considered lesser sanctions,
whether it tried them, and whether it warned the recalcitrant party
about the possibility of case-dispositive sanctions.

27 *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096 (footnotes removed).

28 ///

1 In its May 26, 2017 Order, the Court found that the first four factors weighed in
2 favor of terminating sanctions, *see* ECF No. 176 at 8–9, but that the fifth factor—the
3 availability of less drastic sanctions—“weigh[ed] slightly against termination sanctions,
4 but only because all of Defendant’s misconduct was discovered in one moment.” *Id.* at
5 9–10. The Court therefore “conclude[d] that it [wa]s well within its discretion to award
6 terminating sanctions” but “decline[d] to do so at th[at]s time.” *Id.* at 10. The Court
7 warned, however, that, “[i]f at the conclusion of the neutral forensic evaluation it appears
8 that documents have been destroyed, or that the discovery misconduct is substantially
9 greater than the scope of which Plaintiff is currently aware, Plaintiff [would be] granted
10 leave to renew its Motion for Terminating Sanctions and present the newly discovered
11 evidence.” *Id.* at 11 (emphasis omitted).

12 CrossFit now renews its prior motion, arguing “there is no question that all five
13 factors weigh heavily in favor of termination.” Pl.’s Mem. at 34. The NSCA appears to
14 contest only the third and fifth factors, *see generally* Opp’n at 43–44; Reply at 5, as well
15 as the Court’s authority to issue terminating sanctions. *See generally* Opp’n at 43.

16 *1. The Court’s Authority to Terminate Pursuant to Its Inherent Powers*

17 As an initial matter, the NSCA contends that “the Court cannot impose terminating
18 sanctions based on its inherent authority” based on a party’s loss of discoverable ESI.
19 Opp’n at 43 (citing Fed. R. Civ. P. Adv. Comm. Notes (2015); *Newberry v. Cnty. of San*
20 *Bernadino*, 750 Fed. App’x 534, 537 (9th Cir. 2018); *Small v. Univ. Med. Ctr.*, No. 2:13-
21 cv-0298-APG-PAL, 2018 WL 3795238, at *66 (D. Nev. Aug. 9, 2018)). On reply,
22 CrossFit rejoins that “Rule 37(e) applies *only* to termination based on lost ESI,” meaning
23 “the Court may still exercise its inherent authority to assess whether termination is
24 warranted due to the NSCA’s other misconduct,” including “concealment, perjury,
25 attempted evidence destruction, and discovery order violations.” Reply at 4 (emphasis in
26 original).

27 The Court agrees with CrossFit that it may terminate this action under its inherent
28 powers for discovery misconduct unrelated to the loss of ESI. *Cf. Hugler*, 2017 WL

8941163, at *8 (disagreeing that the 2015 Amendments to Rule 37(e) foreclose reliance on inherent authority because “[i]t is an irrefutable principle of law that the Supreme Court’s authority cannot be limited by a body such as the Advisory Committee” and “it would be poor public policy to require the courts to rely solely upon the Rules to address improper conduct such as spoliation of evidence by the parties appearing before them,” but noting that “when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power”) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)) (citing *CAT3, LLC*, 164 F. Supp. 3d at 497–98).

2. *Prejudice to CrossFit*

The NSCA next argues that CrossFit cannot establish that it has been prejudiced because “there is no showing that CrossFit cannot present its damages theory to the jury” and “lesser drastic sanctions exist to cure the claimed prejudice.” Opp’n at 44. CrossFit responds that it will be prejudiced by having to re-do years of discovery, motion practice, and trial preparation. Reply at 9–10.

The Court concludes that CrossFit has established prejudice as a result of the NSCA’s discovery misconduct. *See also supra* Section II.A.4. CrossFit filed this action in May 2014, *see generally* ECF No. 1, over five years ago. On the eve of the March 23, 2017 final pretrial conference, *see* ECF No. 129, CrossFit discovered that the NSCA had failed to produce relevant documents and filed its prior motion for terminating sanctions. *See generally* ECF Nos. 150, 153. As of the Court’s May 26, 2017 Order, the NSCA had produced only 439 documents. Nahama Decl. ¶ 12. As a result of the Court-ordered neutral forensic evaluation, the NSCA has produced an additional 279,554 documents. Final Rep. at 15. But, as the Ninth Circuit has long cautioned, “[l]ast-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts.” *N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (citing *G-K Props. v. Redev. Agency*, 577 F.2d 645, 647–48 (9th Cir. 1978)).

1 Further, the Court finds compelling CrossFit’s arguments that the NSCA’s conduct
2 will “require CrossFit—*over five years into this case and after already incurring*
3 *exorbitant costs*—to depose or re-depose NSCA representatives (many of whom are no
4 longer with the company and have limited memory of events occurring in 2013 and 2014),
5 re-file dispositive motions, re-conduct expert discovery, and re-prepare for trial.” Reply at
6 10 (emphasis in original) (footnote omitted). Not only does CrossFit still not have all
7 relevant documents, but its prior depositions and expert testimony will have to be revisited,
8 if not entirely redone. Further, “[t]he NSCA’s tactical delays have successfully resulted in
9 the loss of evidence that CrossFit could have more accurately collected five years ago.” *Id.*
10 at 10 n.41. Specifically, the Court finds persuasive CrossFit’s arguments that certain
11 witnesses and their memories are no longer readily available. CrossFit contends, for
12 example, that key witnesses, such as Dr. Sharp, have left the NSCA during the pendency
13 of this litigation, meaning that “CrossFit will now have to subpoena non-parties who would
14 have been readily available to CrossFit but for the NSCA’s misconduct.” *Id.* CrossFit also
15 introduces evidence to support its fears that “witnesses’ memories [are now] significantly
16 impaired,” such as Dr. Kraemer’s increased inability to recall details between his July 15,
17 2015, and December 11, 2018 depositions. *Id.* Such destruction of non-ESI evidence as a
18 result of the repeated discovery misconduct and delay can, indeed, suffice to establish
19 prejudice. *See, e.g., Horn v. California*, No. CIV 05-814 MCE KJM, 2008 WL 4500187,
20 at *1 (E.D. Cal. Oct. 6) (“[D]elay itself generally is prejudicial—witness memories fade
21 and evidence becomes stale or undiscoverable.”), *report & recommendation adopted*, 2008
22 WL 5142959 (Dec. 8, 2008).

23 The NSCA attempts to sidestep these issues, contending that “the only [issue] left
24 after the application of [the Court’s May 26, 2017] issue sanctions is damages,” which
25 means CrossFit would “not [be] starting from scratch.” *See* Tr. at 24:19–22; *see also id.* at
26 63:2–13, 65:11–66:2. The NSCA also claims that “there is no evidence whatsoever . . .
27 that there was a loss of data that goes to [CrossFit’s corrective advertising] damages
28 model.” *Id.* at 67:14–16; *see also id.* at 66:8–68:11. But CrossFit contests the NSCA’s

1 analysis, noting that “there’[re] still issues relating to liability” that were not addressed by
2 the Court’s May 26, 2017 issue sanctions, *see id.* at 71:24–72:1, and that CrossFit’s “theory
3 on damages is [not] limited to corrective advertising,” *id.* at 72:6–7, which “is only one
4 component” among such others as lost revenue. *Id.* at 72:18–19. In its moving papers,
5 CrossFit identified additional discovery based on the documents produced through the
6 forensic evaluation that it considers necessary to establish its damages. *See* Pl.’s Mem. at
7 43–44.

8 The Court also shares CrossFit’s concerns that, “[g]iven the extensive perjury to
9 date, the evidence supplied by the NSCA will also be inherently untrustworthy.” Reply at
10 10. As the Court previously noted, “[t]here is no point to a lawsuit . . . if it merely applies
11 law to lies.” ECF No. 176 at 9 (quoting *Valley Eng’rs Inc.*, 158 F.3d at 1051). Neither
12 CrossFit nor the Court nor the public can trust the veracity of further discovery collected
13 from the NSCA. The Court therefore concludes that CrossFit has established that it will
14 suffer prejudice absent termination.

15 3. *Availability of Less Drastic Sanctions*

16 Finally, the NSCA maintains that “lesser drastic sanctions exist . . . , such as CrossFit
17 being able to designate additional experts so that CrossFit can present its damages theory
18 to the jury.” Opp’n at 44. CrossFit responds that lesser sanctions have proven ineffective
19 given escalations in the NSCA’s misconduct following the Court’s prior issuance of
20 sanctions. *See* Reply at 8–9.

21 The Court imposed a harsh and wide variety of sanctions in its prior Order. *See*
22 *generally* ECF No. 176 at 10–14. The Court has therefore both considered and tried lesser
23 sanctions. *See Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096. Further, the Court made
24 abundantly clear its belief that “it [wa]s well within its discretion to award terminating
25 sanctions” on the record as it existed in May 2017, ECF No. 176 at 10; nonetheless, the
26 Court “decline[d] to do so at th[at] time,” in part because there was then “no indication that
27 the NSCA ha[d] actually destroyed evidence.” *Id.* The Court therefore denied CrossFit’s
28 motion for terminating sanctions without prejudice, *id.* at 14, and explicitly granted

1 CrossFit leave to renew its request for terminating sanctions “[i]f at the conclusion of the
2 neutral forensic evaluation it appear[ed] that documents ha[d] been destroyed, or that the
3 discovery misconduct [wa]s substantially greater than the scope of which Plaintiff [wa]s
4 currently aware.” *Id.* at 11. Consequently, the NSCA has long been on notice “about the
5 possibility of case-dispositive sanctions.” *See Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096.

6 But those lesser sanctions and warnings have proven ineffective. Whether out of
7 spite or incompetence, the NSCA repeatedly obstructed Stroz’s forensic evaluation, unable
8 or unwilling to identify custodians, search terms, and devices. *See* Final Rep. at 5–12.
9 Stroz discovered mass deletions and deletions of presumptively relevant documents
10 occurring even after the Court imposed lesser sanctions in May 2017. *See id.* at 12–13.
11 Meanwhile, the NSCA refuses to take accountability, instead misrepresenting Stroz’s
12 findings and blaming its prior counsel.¹⁹

13
14 ¹⁹ For example, the NSCA claims throughout its Opposition that “Stroz found ‘no evidence of data wiping
15 on any of the collected devices’ and ‘no evidence of deletion of the Exhibit A Documents.’” *See, e.g.,*
16 Opp’n at 1 (quoting Final Rep. at 12–13); *see also* Tr. at 63:20–64:2. But the NSCA selectively omits
17 that “Potentially Relevant Documents and mass deletions were identified across some devices.” Final
18 Rep. at 13.

19 The NSCA also claims that “prior counsel[] fail[ed] to properly advise the NSCA about collecting and
20 producing the responsive documents that existed.” Opp’n at 33; *see also id.* at 49 (“As a result of its prior
21 counsel’s substantial and meaningful failures, the NSCA initially did not comply with some of its
22 discovery obligations and this Court awarded CrossFit meaningful issue and adverse inference
23 sanctions.”). The NSCA notes that it “took the Sanctions Order very seriously” and “hired new counsel.”
24 *Id.* at 11. But CrossFit is correct that “[t]he NSCA cannot avoid responsibility for its misconduct by
25 blaming its first defense counsel.” Reply at 9 n.38 (citing *In re Fitzsimmons*, 920 F.2d 1468, 1472 n.3
26 (9th Cir. 1990)). Moreover, prior counsel “cannot be blamed for the perjury, destruction, and attempted
27 destruction by key NSCA witnesses,” and the NSCA has engaged in a pattern of concealment and
28 destruction of evidence across several lawsuits. *See id.*; *see also Nat’l Strength & Conditioning Ass’n v.*
Glassman, No. 37-2016-00014339-CU-DF-CTL (Cal. Super. filed May 2, 2016); *Potterf v. Nat’l Strength*
& Conditioning Ass’n, No. 14CV3293 (Ohio C.P. Franklin Cnty. filed Mar. 26, 2014).

25 In any event, the record belies the claim that “the big difference, the line of demarcation in this case is
26 when the Noonan Lance law firm got involved and . . . from that point in time, the focus was to be full
27 disclosure, full transparency.” Tr. at 37:12–15. Noonan Lance formally appeared in this action in August
28 2017. *See* ECF Nos. 206–08. Nonetheless, mass deletions and deletions of potentially relevant documents
continued to occur after that date. *See* Final Rep. at 13; Final Rep. App. E. And despite Noonan Lance’s
assertion that “[e]verybody turned in their devices. Everybody did,” *see* Tr. at 37:18–19, Stroz
emphasized that “there was a lot of lack of clarity about what was out there and what wasn’t,” *id.* at 45:19–

1 The Ninth Circuit has long recognized that “[d]ismissal is appropriate where a
2 ‘pattern of deception and discovery abuse made it impossible’ for the district court to
3 conduct a trial ‘with any reasonable assurance that the truth would be available.’” *Valley*
4 *Eng’rs Inc.*, 158 F.3d at 1057–58 (quoting *Anheuser-Busch, Inc. v. Nat. Beverage*
5 *Distribs.*, 69 F.3d 337, 352 (9th Cir. 1995)). Although the Court had hoped that lesser
6 sanctions would provide reasonable assurance that this action could be resolved fairly on
7 the merits, the NSCA’s continued “discovery violations [have] ma[d]e it impossible for
8 [the C]ourt to be confident that the parties will ever have access to the true facts.” *See id.*
9 at 1058. Because there can no longer be assurance of proceeding on the true facts,
10 termination is appropriate. *See, e.g., id.* The Court therefore **GRANTS** CrossFit’s Motion
11 to the extent it seeks terminating sanctions pursuant to the Court’s inherent powers.

12 **III. Evidentiary Sanctions**

13 Because “[t]he NSCA’s concealment and spoliation prevents CrossFit from fairly
14 proving its damages without additional experts . . . , CrossFit requests that the Court issue
15 evidentiary sanctions against the NSCA by permitting CrossFit to submit its damages
16 evidence, including new and additional expert reports, through unopposed briefing in lieu
17 of an evidentiary hearing.” Pl.’s Mem. at 39. Specifically, CrossFit requests that the Court
18 order the following evidentiary sanctions: “1. NSCA may not contest the admissibility,
19 authenticity, foundation, or relevance of any documents produced to CrossFit by Stroz,
20 including CrossFit’s expert’s analysis of the same” and “2. Based upon the NSCA’s
21 withholding of documents and information related to its marketing efforts, CrossFit is not
22

23 20, culminating in the discovery only months before Stroz filed its Final Report that there were
24 “potentially other sources of media . . . out there that [Stroz] didn’t have access to,” *see id.* at 45:15–18,
25 and that Stroz “[ha]d never seen.” *See id.* at 48:19–21. Stroz also indicated to the Court that, although
26 the NSCA may have been “cooperat[ive],” it “got a lot of misinformation both while [it] w[as] onsite and
27 characterization of information since.” *See id.* at 44:18–22.

27 To be clear, the Court does not attribute these shortcomings to Noonan Lance; as CrossFit aptly notes, it
28 is “[t]he NSCA—not its numerous law firms—[that] is the common denominator and the true bad actor.”
See Reply at 9 n.38. The point is that the record does not support that the NSCA is a “litigant that got the
message” following the Court’s May 26, 2017 Order. *See Tr.* at 38:6.

1 required to separate the causal effects of the NSCA’s lawful marketing efforts from those
2 of the NSCA’s unlawful marketing efforts.” Decl. of Justin Nahama in Support of Reply
3 (“Nahama Reply Decl.”) Ex. 129, ECF No. 370-23

4 The NSCA protests that CrossFit’s “damages must be established by CrossFit in an
5 evidentiary proceeding in which the NSCA has the opportunity to contest the amount.”
6 Opp’n at 46 (citing *Greyhound Exhibitgrp., Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155,
7 158 (2d Cir. 1992)). CrossFit responds that “[w]hile defaulting parties are *generally*
8 entitled to participate in a damages hearing, the NSCA is much worse than a defaulting
9 party who simply failed to show up; it is an affirmative wrongdoer that engaged in a five-
10 year marathon of malfeasance.” Reply at 11.

11 CrossFit cites a single, nonpublished, out-of-circuit decision, *O’Connor v. Powell*,
12 No. 99 C 6582, 2000 WL 1230459 (N.D. Ill. Aug. 23, 2000), to support its contention that
13 the Court may prohibit the NSCA from introducing evidence disputing the amount of
14 damages to which CrossFit is entitled. *See* Pl.’s Mem. at 39–40. Although the Court may
15 be well within its discretion to grant the relief CrossFit seeks, the Court ultimately
16 concludes that the weight of authority supports allowing the NSCA the opportunity to
17 contest CrossFit’s damages evidence. *See, e.g., Rubicon Glob. Ventures, Inc. v. Chongqing*
18 *Zongshen Grp. Imp./Exp. Corp.*, 226 F. Supp. 3d 1141, 1147 (D. Or. 2016) (“Even though
19 there is disagreement regarding a defaulting party’s right to notice of a damages hearing,
20 courts generally agree that a defaulting party has ‘the right to participate in such a hearing.’
21 . . . This does not mean the defaulting party may present evidence going solely to liability,
22 but she ‘may cross-examine the opposing witnesses and introduce evidence on [her] own
23 behalf in *mitigation of the damages.*’”) (second alteration and emphasis in original)
24 (quoting B. Finberg, *Defaulting Defendant’s Right to Notice and Hearing as to*
25 *Determination of Amount of Damages*, 15 A.L.R.3d 586 (1967)) (citing *Henry v. Sneiders*,
26 490 F.2d 315, 318 (9th Cir. 1974); *Oire Or. C, LLC v. Yaldo*, No. CV 08-724-ST, 2008
27 WL 5071709, at *1 (D. Or. Nov. 25, 2008)). The Court therefore **DENIES** CrossFit’s
28 request for evidentiary sanctions.

IV. Issue Sanctions

CrossFit maintains that, “if the NSCA is not prohibited from opposing CrossFit’s damages evidence, CrossFit maintains that specific issue and evidentiary sanctions related to damages are necessary.” Reply at 11 (citing Nahama Reply Decl. Ex. 129). CrossFit requests eight specific issue sanctions related to damages. *See* Nahama Reply Decl. Ex. 129. Although the NSCA did not respond directly to the requested issue sanctions at the October 22, 2019 hearing, counsel did indicate its belief that the May 26, 2017 sanctions sufficed. *See, e.g.*, Tr. at 36:11–24.

In light of its above analysis, *see supra* Section III, the Court concludes that additional issue sanctions concerning CrossFit’s damages are warranted here. The Court therefore **AWARDS** the following issue sanctions:

1. It is taken as established that the NSCA’s unfair competition and false advertising—including its false statements in the Devor Article, Erratum, Hak Study, various TSAC Report articles about CrossFit, content promoted at NSCA events referencing CrossFit-related injuries, and republication of these false statements—have deceived and continue to deceive the public and consumers regarding the safety and effectiveness of CrossFit training;

2. It is taken as established that the NSCA’s unfair competition and false advertising—including its false statements in the Devor Article, Erratum, Hak Study, various TSAC Report articles about CrossFit, content promoted at NSCA events referencing CrossFit-related injuries, and republication of these false statements—caused a decline in CrossFit’s seminar revenue in the military, United States, and international fitness markets;

3. It is taken as established that the NSCA’s unfair competition and false advertising—including its false statements in the Devor Article, Erratum, Hak Study, various TSAC Report articles about CrossFit, content promoted at NSCA events referencing CrossFit-related injuries, and republication of these false statements—were willful and malicious;

1 4. It is taken as established that the NSCA’s unfair competition and false
2 advertising—including its false statements in the Devor Article, Erratum, Hak Study,
3 various TSAC Report articles about CrossFit, any content promoted at NSCA events
4 referencing CrossFit-related injuries, and republication of these false statements—have
5 increased NSCA revenue, growth, and goodwill, while injuring CrossFit’s revenue,
6 growth, and goodwill;

7 5. It is taken as established that the NSCA’s unfair competition and false
8 advertising were a material cause of CrossFit’s damages; and

9 6. It is taken as established that CrossFit’s efforts to combat, correct for, and
10 mitigate the misinformation spread through the NSCA’s false advertising, including
11 references to the false injury data, were reasonable, appropriate, and not a material cause
12 of CrossFit’s damages.

13 **V. Monetary Sanctions**

14 Finally, CrossFit contends that “[t]he NSCA’s misconduct warrants monetary
15 sanctions under three independent grounds.” Pl.’s Mem. at 44. “First, under Rule
16 37(b)(2)(C), the Court ‘must order the disobedient party . . . to pay the reasonable expenses,
17 including attorney’s fees, cause by the failure [to obey an order to provide or permit
18 discovery]’” and “[u]nder Rule 37(c)(1)(A) the Court ‘may order payment of the
19 reasonable expenses, including attorney’s fees, caused by the failure [to provide full and
20 complete disclosures pursuant to Rule 26(a) or (e) or to supplement those disclosures.’”
21 Pl.’s Mem. at 44 (alterations in original) (emphasis in original) (quoting Fed. R. Civ. P.
22 37(b)(2)(C), (c)(1)(A)). “Second, Rule 26(g)(3) requires the Court to issue an ‘appropriate
23 sanction’ that ‘may include an order to pay the reasonable expenses, including attorney’s
24 fees.’” Pl.’s Mem. at 44 (emphasis in original) (quoting Fed. R. Civ. P. 26(g)(3) (citing
25 *Rodman v. Safeway*, No. 11-CV-03003-JST, 2016 WL 5791210, at *3–4 (N.D. Cal. Oct.
26 4, 2016)). “Third, beyond these specific Rule-based sanctions, the Court has the inherent
27 power to issue monetary sanctions for expenses and fees to redress abusive litigation and
28 ///

1 other bad-faith practices.” *Id.* (emphasis in original) (citing *Primus Auto. Fin. Servs., Inc.*
2 *v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)).

3 Specifically, CrossFit seeks \$3,997,868.66 plus any additional fees incurred after
4 August 22, 2019,²⁰ as monetary sanctions for the following: \$485,846.03 incurred in
5 bringing two affirmative motions for summary judgment (ECF Nos. 38, 74); \$325,359.16
6 incurred for bringing various joint motions to compel (*see, e.g.*, ECF Nos. 25, 30, 57, 70);
7 \$129,651.58 incurred to oppose the NSCA’s motion for summary judgment (ECF No.
8 102); \$106,290.50 incurred to oppose the NSCA’s motion to reopen expert discovery (ECF
9 No. 215); \$603,859.11 incurred in depositions of the NSCA’s witnesses conducted prior to
10 the Court’s May 26, 2017 Order imposing sanctions; \$219,685.52 expended to obtain the
11 opinions and depositions of CrossFit’s experts prior to the Court’s May 26, 2017 Order
12 imposing sanctions; \$79,539.51 expended to obtain the opinions and depositions of the
13 NSCA’s experts prior to the Court’s May 26, 2017 Order imposing sanctions; \$486,956.66
14 incurred for trial preparation before the Court’s May 26, 2017 Order; \$99,346.25 incurred
15 to oppose the NSCA’s motion for reconsideration of the Court’s May 26, 2017 Order (ECF
16 No. 186); \$203,060.68 expended on the Court-ordered forensic evaluation; \$211,885.87
17 expended on depositions of NSCA witnesses concerning evidence preservation, collection,
18 and production; \$67,666.37 incurred to challenge the NSCA’s improper and overly broad
19 confidentiality designations; and \$441,609.65 incurred as of May 31, 2019, and
20 \$537,111.77 incurred as of August 22, 2019, for work performed in connection with the
21 instant Motion. *See* Pl.’s Mem. at 45–50; Reply at 19.

22 The NSCA concedes that CrossFit is entitled to attorneys’ fees “incurred solely
23 because of the misconduct,” *i.e.*, fees that CrossFit “would not have incurred but for the
24 bad faith.” Opp’n at 47 (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. ___,
25 137 S. Ct. 1178, 1183–84 (2017)). The NSCA contends, however, that at least some
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27
28 ²⁰ \$3,460,756.89 as of the filing of CrossFit’s Motion, *see* Pl.’s Mem. at 50, plus an additional \$537,111.77
as of the filing of its Reply. *See* Reply at 19.

1 portion of CrossFit’s requested fees are not recoverable because “either they would have
2 been incurred even in the absence of the NSCA’s deficient document production or are
3 excessive.” *Id.* (citing *Goodyear*, 137 S. Ct. at 1183–84). Specifically, the NSCA claims
4 that \$2,946,646.09 expended on CrossFit’s motions for summary judgment, CrossFit’s
5 motions to compel and confidentiality challenges, the NSCA’s motion for summary
6 judgment, the NSCA’s motion to reopen expert discovery, pre-sanctions depositions of the
7 NSCA’s witnesses, pre-sanctions discovery concerning CrossFit’s and the NSCA’s
8 experts, pre-sanctions trial preparation, and the instant Motion. *Id.* at 48–49. The NSCA
9 also challenges an additional \$254,255.43 related to billing entries that contain
10 nonrecoverable tasks or insufficient detail to determine whether the claimed cost is
11 recoverable, fail to note the time allocated to a recoverable item, or reflect general litigation
12 work that would have been preformed in any event. *See id.* at 49.

13 CrossFit responds that it would not “have engaged in [any of the] work [for which
14 fees are requested] *if it had known* that the NSCA was withholding over 279,000
15 documents” and argues that the NSCA “ignores that [it]’s misconduct and
16 misrepresentations about its spoliation have ‘vastly increase[d] the cost of litigation by
17 drawing out deadlines and necessitating motion practice.’” Reply at 20 (emphasis in
18 original) (quoting *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 631 (2d
19 Cir. 2018)). CrossFit adds that, “[i]f the Court is inclined to reduce block-billed entries, it
20 should appropriately reduce **only those specific entries.**” *Id.* (emphasis in original).

21 It is clear that additional monetary sanctions are warranted; the question is in what
22 amount. At the hearing, *see* Tr. at 17:12–19, the Court noted that the Supreme Court has
23 recognized that, “[i]n exceptional cases, the but-for standard even permits a trial court to
24 shift all of a party’s fees, from either the start or some midpoint of a suit, in one fell swoop,”
25 such as where “the district court could reasonably conclude that all legal expenses in the
26 suit ‘were caused . . . solely by [the sanctioned party’s] fraudulent and brazenly unethical
27 efforts.’” *Goodyear*, 137 S. Ct. at 1187–88 (quoting *Chambers*, 501 U.S. at 58). The Court
28 asked each Party whether this is such a case. *See* Tr. at 17:19–30, 36:25–37:8.

1 Not surprisingly, CrossFit advocated that it is, *see id.* at 17:21–19:5, 57:8–61:21,
2 while the NSCA disagreed. *See id.* at 37:9–38:19. Specifically, CrossFit argued that
3 “every step of this case was poisoned by the NSCA’s decisions from inception.” *See id.* at
4 18:11–12. For example, “in response [to CrossFit’s discovery requests], the NSCA
5 withheld evidence, withheld documents, [and] didn’t give accurate or correct answers.” *Id.*
6 at 58:3–5. “In fact, the NSCA concealed the existence of an entire marketing department.”
7 *Id.* at 58:8–9. Consequently, CrossFit proceeded to take depositions with a limited
8 knowledge of relevant witnesses and on a record of only 439 documents, meaning CrossFit
9 “didn’t depose the right people” and “didn’t ask the right questions.” *See id.* at 58:5–13.
10 The NSCA’s withholding of relevant documents, in turn, led “CrossFit [to] spend[] a ton
11 of money trying to compel and []force the NSCA to meet its discovery obligations, all to
12 no avail.” *Id.* at 58:15–17. Then “CrossFit ha[d] to twice move for summary judgment on
13 falsity . . . because the tons of documents that [it] would have relief on were not produced,”
14 thereby rendering “it immeasurably more expensive, immeasurable more difficult.” *Id.* at
15 58:20–59:1. CrossFit “also had to defend against the NSCA’s motion for summary
16 judgment,” a “motion [that] would have never been filed and [CrossFit] would never have
17 had to oppose . . . had [withheld] documents [listing CrossFit as the NSCA’s number-one
18 competitor] been produced.” *Id.* at 59:2–9. Then came “expert discovery,” but CrossFit
19 could not “even realize how far [it] ha[d] been damaged because [it] didn’t receive the
20 spreadsheet showing the spread of the Devor article and what [the NSCA] w[as] tracking
21 and how [it] w[as] leveraging it until this year.” *Id.* at 59:10–16. CrossFit then prepared
22 for the mandatory settlement conference before Magistrate Judge Crawford and trial “on a
23 record of 439 documents, perjury, and incomplete deposition testimony.” *See id.* at
24 59:17–60:1. It was only at that point that the NSCA’s prior discovery misconduct was
25 revealed, *see id.* at 59:18–24, which resulted in the Court-ordered forensic evaluation,
26 “during [which the NSCA’s] misconduct not only continue[d]; it escalate[d].” *See id.* at
27 60:2–3. Specifically, “[t]he NSCA [did]n’t know what its search terms were. It [did]n’t
28 know who its custodians were. It [did]n’t know where its documents are. It [did]n’t even

1 know which devices it has.” *Id.* at 60:3–6. CrossFit also engaged in “another round of
2 expert discovery,” during which additional discovery misconduct came to light, including
3 the NSCA “using documents the[NSCA] withheld from [CrossFit] but provided to [its]
4 own expert,” thereby prompting additional discovery disputes before Magistrate Judge
5 Crawford. *See id.* at 60:1–6. In short, according to CrossFit, “[e]very single stage of this
6 litigation has been infected by the NSCA’s seeming unwillingness to stop being a
7 recalcitrant litigant and to litigate this case on a fair record,” as a result of which “[t]here
8 is no aspect of this case that has not been corrupted by the[NSCA’s] misconduct.” *See id.*
9 at 60:12–17.

10 The NSCA, on the other hand, contends that it cooperated fully once its prior
11 counsel, Noonan Lance, substituted in:

12 the big difference, the line of demarcation in this case is when
13 the Noonan Lance law firm got involved and . . . , from that point
14 in time, the focus was to be full disclosure, full transparency.
15 That’s why the[NSCA] agreed to all devices, not just the 39
16 custodians. Over, over a hundred people. Secretaries turned in
their phones. Custodians. Everybody turned in their devices.
Everybody did.

17 *Id.* at 37:12–19. As a result, “[t]his has been a full-disclosure case where everything was
18 turned over. That’s why so much was preserved. That’s why [Stroz collected] the [12]
19 Terabytes.” *Id.* at 37:25–3. The NSCA therefore urges that it “got the message” and that
20 this litigation got on the right track:

21 here’s a litigant that got the message, hired new counsel, turned
22 over every available device that they had from every employee
23 at the place, turned over [12] Terabytes of information, and
24 what’s the message that they still get terminat[ing] sanctions
25 . . . ? How is that message to the public and the judiciary? The
26 question becomes, what could they have done? Yes, they should
27 have done a lot better before Noonan Lance got involved.
Absolutely. But Noonan Lance took your sanctions Order
seriously, turned over all that data and everybody’s devices.
What else could they have done?

28 *Id.* at 38:6–16.

1 For the reasons discussed above, *see, e.g., supra* Sections II.A, II.C–D, the Court
2 concludes that the only message that can be conveyed on this record is that this is the sort
3 of “exceptional case[]” that was defended “in complete bad faith, so that every cost of
4 [litigating it once the obstructionism began] is attributable to sanctioned behavior.” *See*
5 *Goodyear*, 137 S. Ct. at 1187–88. Accordingly, “all legal expenses . . . [CrossFit seeks]
6 ‘were caused . . . solely by [the NSCA’s] fraudulent and brazenly unethical efforts.’” *See*
7 *id.* at 1187–88 (quoting *Chambers*, 501 U.S. at 58). The Court therefore concludes that it
8 is appropriate to grant CrossFit the fees it seeks “in one fell swoop,” *see id.* at 1187, with
9 due consideration of the NSCA’s challenges to the reasonableness of the requested fees
10 and the block-billed entries. *See* Opp’n at 49.

11 The Court has carefully reviewed the declarations and timesheets submitted by
12 counsel for CrossFit—Troutman Sanders LLP, *see* ECF Nos. 331, 346-1–2, 364, 374, and
13 Troutman Sanders eMerge, *see* ECF Nos. 334, 346-3–4, 367, 375; Mintz, Levin, Cohn,
14 Ferris, Glovsky & Popeo, PC, *see* ECF Nos. 332, 346-5–6, 365; and Latham & Watkins
15 LLP, *see* ECF Nos. 333, 346-7–8, 366—and finds the requested fees to be reasonable and
16 reasonably incurred under the circumstances. The NSCA does not challenge any of the
17 hourly rates charged, *see* ECF No. 353-1 at 72–104, which were below the billers’ standard
18 hourly rates, and “declarations of plaintiff’s counsel can be sufficient to establish the
19 reasonable market rate where the defendant does not oppose or challenge the
20 asserted rates.” *De La Riva Const., Inc. v. Marcon Eng’g, Inc.*, No. 11-CV-52-MMA DHB,
21 2014 WL 794807, at *5 (S.D. Cal. Feb. 27, 2014); *see also United Steelworkers of Am. v.*
22 *Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (“Affidavits of the [fee-seeking
23 party’s] attorney and other attorneys regarding prevailing fees in the community . . . are
24 satisfactory evidence of the prevailing market rate.”) (citing *Chalmers v. City of L.A.*, 796
25 F.2d 1205, 1214 (9th Cir. 1986)). Further, the hourly rates charged are consistent with the
26 Court’s experience regarding the rates charged in the San Diego community and those
27 found reasonable for other national, high-caliber law firms practicing complex civil
28 litigation in this District. *See, e.g., LG Corp. v. Huang Xiaowen*, No. 16-CV-1162 JLS

1 (NLS), 2017 WL 3877741, at *2–3 (S.D. Cal. Sept. 5, 2017) (finding reasonable hourly
2 rates between \$140 to \$890 for work by “international . . . firm with numerous accolades”
3 in patent matter); *Lobaton v. City of San Diego*, No. 3:15-CV-1416-GPC-DHB, 2017 WL
4 3622248, at *3 (S.D. Cal. Aug. 22, 2017) (finding reasonable hourly rate of \$825 for highly
5 experienced attorneys) (collecting cases); *Zest IP Holdings, LLC v. Implant Direct Mfg.,*
6 *LLC*, No. 10-CV-0541-GPC WVG, 2014 WL 6851612, at *5–6 (S.D. Cal. Dec. 3, 2014)
7 (finding reasonable hourly rates between \$170 and \$895 for work by “multi-state/national
8 law firm” in patent matter).

9 The Court also contends that, given the circumstances, the hours expended here were
10 reasonable. The NSCA contends, for example, that the amounts CrossFit seeks for
11 preparing the instant Motion is “excessive, unreasonable, and must be substantially reduced
12 based on FRCP 37(b)(2)(C) and (c)(1)(A).” Opp’n at 49. Based on the Court’s calculation,
13 it appears that 2904 hours were billed in fully briefing the instant Motion. *See* ECF No.
14 364-1 at 65 (731 hours); ECF No. 367-1 at 35 (752.5 hours); ECF No. 374-1 at 5, 15, 19,
15 23, 30, 35 (1070.6 hours); ECF No. 375-1 at 2, 4–5, 8–9,11 (349.9 hours). Although a
16 staggering number of hours, review of the billing entries corroborates the scope of this
17 undertaking, which culminated in the filing of—literally—thousands of pages of legal
18 memoranda, declarations, and exhibits. *See* ECF Nos. 326–37, 359–67, 369–77. Indeed,
19 in addition to researching and writing the instant Motion, CrossFit’s counsel had to comb
20 through the nearly 300,000 documents the NSCA had only recently produced. Given the
21 Herculean task of preparing the instant Motion, the Court finds that the number of hours
22 expended—shocking as it is—is reasonable given the circumstances. The same is true for
23 the other tasks for which CrossFit seeks to recover its fees through the instant Motion.

24 Finally, the NSCA challenges certain entries for work that is block-billed, not
25 recoverable or would have been performed anyway, or provides insufficient detail. *See*
26 *Ruch Decl. Ex. 27–29*. Given the Court’s conclusion that every cost CrossFit seeks to
27 recover through the instant Motion is attributable to the NSCA’s bad faith, the Court
28 determines that the NSCA’s challenges to recoverability and block billing are without

merit. Further, CrossFit has provided the Court with unredacted billing statements that provide sufficient detail for the Court to conclude that the costs incurred were, in fact, reasonable. Accordingly, the Court **AWARDS** CrossFit monetary sanctions in the form of attorneys' fees in the amount of \$3,997,868.66.

CONCLUSION

As indicated at the October 22, 2019 hearing, in twenty-five years on the bench, "[t]his is the first case that [the Court] ha[s] ever had that has gotten to this point." *See* Tr. at 77:16–19. This is a "serious, momentous issue" that the Court does not take lightly. *See id.* at 78:4, 79:15–18. Having carefully considered the record, "[t]he severity and frequency of defendant[']s bad faith misconduct is as egregious as anything this [C]ourt has ever seen or read in any of the cases." *See Am. Rena Int'l Corp. v. Sis-Joyce Int'l Co.*, No. CV126972FMOJEMX, 2015 WL 12732433, at *46 (C.D. Cal. Dec. 14, 2015). Because the NSCA's pervasive "discovery violations 'threaten to interfere with the rightful decision of the case,'" *Valley Eng'rs Inc.*, 158 F.3d at 1057 (quoting *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990)), the Court **GRANTS IN PART** and **DENIES IN PART** CrossFit's Motion (ECF Nos. 326, 359). Specifically, the Court:

1. **GRANTS** CrossFit's request for terminating sanctions under Federal Rule of Civil Procedure 37(b);

2. **DENIES** CrossFit's request for terminating sanctions pursuant to Federal Rule of Civil Procedure 37(c);

3. **GRANTS** CrossFit's request for terminating sanctions under Federal Rule of Civil Procedure 37(e);

4. **GRANTS** CrossFit's request for terminating sanctions under the Court's inherent powers;

5. **DENIES** CrossFit's request for evidentiary sanctions related to damages;

6. **GRANTS** CrossFit's request for the following additional issue sanctions related to damages:

///

1 a. It is taken as established that the NSCA's unfair competition and false
2 advertising—including its false statements in the Devor Article, Erratum, Hak
3 Study, various TSAC Report articles about CrossFit, content promoted at NSCA
4 events referencing CrossFit-related injuries, and republication of these false
5 statements—have deceived and continue to deceive the public and consumers
6 regarding the safety and effectiveness of CrossFit training;

7 b. It is taken as established that the NSCA's unfair competition and false
8 advertising—including its false statements in the Devor Article, Erratum, Hak
9 Study, various TSAC Report articles about CrossFit, content promoted at NSCA
10 events referencing CrossFit-related injuries, and republication of these false
11 statements—caused a decline in CrossFit's seminar revenue in the military, United
12 States, and international fitness markets;

13 c. It is taken as established that the NSCA's unfair competition and false
14 advertising—including its false statements in the Devor Article, Erratum, Hak
15 Study, various TSAC Report articles about CrossFit, content promoted at NSCA
16 events referencing CrossFit-related injuries, and republication of these false
17 statements—were willful and malicious;

18 d. It is taken as established that the NSCA's unfair competition and false
19 advertising—including its false statements in the Devor Article, Erratum, Hak
20 Study, various TSAC Report articles about CrossFit, any content promoted at NSCA
21 events referencing CrossFit-related injuries, and republication of these false
22 statements—have increased NSCA revenue, growth, and goodwill, while injuring
23 CrossFit's revenue, growth, and goodwill;

24 e. It is taken as established that the NSCA's unfair competition and false
25 advertising were a material cause of CrossFit's damages; and

26 f. It is taken as established that CrossFit's efforts to combat, correct for,
27 and mitigate the misinformation spread through the NSCA's false advertising,
28

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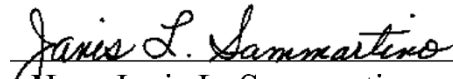
1 including references to the false injury data, were reasonable, appropriate, and not a
2 material cause of CrossFit's damages; and

3 7. **GRANTS** CrossFit's request for monetary sanctions in the amount of
4 \$3,997,868.66.

5 Accordingly, the Court **STRIKES** the NSCA's Answers (ECF Nos. 9, 88, 191, 192)
6 to CrossFit's Complaints and **ORDERS** the Clerk of Court to enter default against the
7 NSCA in favor of CrossFit. To resolve the amount of damages to which CrossFit is entitled
8 and the terms for the NSCA's payment of the ordered monetary sanctions to CrossFit, the
9 Court **ORDERS** the Parties to meet and confer on or before December 31, 2019, and to
10 file a Joint Status Report on or before January 14, 2019. Should the Parties fail to reach
11 agreement concerning the amount of damages to which CrossFit is entitled, the Court
12 **ORDERS** CrossFit to file a motion for default judgment addressing the damages CrossFit
13 seeks on or before April 13, 2020.

14 **IT IS SO ORDERED.**

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16 Dated: December 4, 2019


Hon. Janis L. Sammartino
United States District Judge